Supreme Court, U.S.
FILED

981541 MAR 25 1999

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

EVE BRUNEAU, A MINOR, BY AND THROUGH HER GUARDIANS AD LITEM, PAT SCHOFIELD AND JOHN BRUNEAU, *Petitioner*,

v.

SOUTH KORTRIGHT CENTRAL SCHOOL AND SOUTH KORTRIGHT SCHOOL BOARD, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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MARCH 24, 1999

8488

QUESTION PRESENTED FOR REVIEW

Does Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, preclude a plaintiff from bringing a claim for violation of her Equal Protection Clause rights under 42 U.S.C. § 1983?

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 4

I. The Decision Has Created A Three-to-Three Split Among The Courts Of Appeals Concerning Whether Title IX Divests A Plaintiff Of Her Ability To Bring A Constitutionally-Based § 1983 Claim Arising From The Same Set Of Facts 5

II. The Decision Of The Court Of Appeals Is Erroneous 7

A. The Court Of Appeals Misapplied Supreme Court Doctrine 7

B. Title IX And Equal Protection Clause Sexual Harassment Claims Are Not "Virtually Identical" 9

C. Congress Did Not Intend To Preclude Constitutionally-Based § 1983 Claims By Passing Title IX.....12

III. The Issue Presented Is An Important Issue Of Law.....13

CONCLUSION.....13

APPENDIX :

A. Opinion Of The Court Of Appeals.....1a

B. Judgment Of The District Court.....29a

C. Decision And Order Of The District Court.....31a

TABLE OF AUTHORITIES

CASES **PAGE(S)**

Adickes v. S.H. Kress & Co.,
398 U.S. 144 (1970) 11

Blessing v. Freestone,
520 U.S. 329 (1997) 4

Bruneau v. South Kortright Central School District,
163 F.3d 749 (2d Cir. 1998) ..... *passim*

Bruneau v South Kortright Central School District,
935 F. Supp. 162 (N.D.N.Y. 1996) 1

Cannon v. University of Chicago,
441 U.S. 677 (1979) 12

City of Canton, Ohio v. Harris,
489 U.S. 378 (1989) 11

City of St. Louis v. Praprotnik,
485 U.S. 112 (1988) 11

Crawford v. Davis,
109 F.3d 1281 (8th Cir. 1997) 4, 6, 8

Davis v. Monroe County Board. of Education,
120 F.3d 1390 (11th Cir. 1997), cert. granted,
119 S. Ct. 29 (1998) 3, 10

Franklin v. Gwinnett County Public Schools,
503 U.S. 60 (1992) 12

Gebser v. Lago Vista Independent School District,
118 S. Ct. 1989 (1998) 9, 12

Jett v. Dallas Independent School District,
491 U.S. 701 (1989) 11

Lillard v. Shelby County Board of Education,
76 F.3d 716 (6th Cir. 1996) 4, 5, 6, 8

Middlesex County Sewerage Authority v. National Sea Clammers Association,
453 U.S. 1 (1981) 6, 7, 8

Mississippi University for Women v. Hogan,
458 U.S. 718, 732 (1982) 10

Monell v. Department of Social Services,
436 U.S. 658 (1978) 11

Monroe v. Pape,
365 U.S. 167 (1961) 9

Pfeiffer v. Marion Center Area School. District.,
917 F.2d 779 (3rd Cir. 1990) 4, 6, 8

Seamons v. Snow,
84 F.3d 1226 (10th Cir. 1996) 4, 6, 8

Smith v. Robinson,
468 U.S. 992 (1984) 4, 6, 7, 8, 12

Waid v. Merrill Area Public Schools,
91 F.3d 857 (7th Cir. 1996) 4, 6, 8

Williams v. The School District of Bethlehem, PA,
998 F.2d 168 (3rd Cir. 1993) 6

STATUTES

20 U.S.C. § 1681 2

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 ..... *passim*

MISCELLANEOUS

U.S. CONST. *amend.* XIV ..... *passim*

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1998

EVE BRUNEAU, A MINOR, BY AND THROUGH HER GUARDIANS AD LITEM, PAT SCHOFIELD AND JOHN BRUNEAU, *Petitioner,*

v.

SOUTH KORTRIGHT CENTRAL SCHOOL AND SOUTH KORTRIGHT SCHOOL BOARD, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Eve Bruneau, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on December 31, 1998.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a-28a) is reported at 163 F.3d 749 (2d Cir. 1998). The judgment of the United States District Court, Northern District of New York, (App., *infra*, 29a-30a) which was entered upon a general jury verdict against petitioner, was not reported. The district court opinion (App., *infra*, 31a - 64a) granting partial summary judgment in favor of respondents was reported at 935 F. Supp. 162 (N.D.N.Y. 1996).

JURISDICTION

The Court of Appeals entered its judgment on December 31, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. UNITED STATES CONSTITUTION

Amendment XIV, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. UNITED STATES CODE

A. *20 U.S.C. § 1681 ("Title IX")*

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .

B. *42 U.S.C. § 1983*

Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

STATEMENT OF THE CASE

This case presents the issue whether a sexual harassment plaintiff with a claim under Title IX is precluded from bringing constitutionally-based § 1983 claims arising from

the same underlying facts. The issue is one that has evenly divided the six federal courts of appeal that have considered the question.

Petitioner, Eve Bruneau, sued her public school and certain school officials under both Title IX and § 1983 in the United States District Court, Northern District of New York, alleging that her male classmates created a hostile educational environment by subjecting her to verbal and physical sexual harassment and that the school failed to remedy the harassment. App. at 5a. The district court granted summary judgment on the § 1983 claims, leaving only the Title IX claim to be tried before a jury. App. at 8a. Following a 10 day trial, the jury returned a verdict in favor of the school.

Petitioner brought a timely appeal to the United States Court of Appeals for the Second Circuit. Among the issues submitted to the Court of Appeals was the issue whether the district court erred by dismissing petitioner's Equal Protection claim brought under § 1983. The Court of Appeals affirmed the dismissal of this § 1983 claim against both the individual school officials and the school. The Court of Appeals held that a Title IX plaintiff can not bring a claim asserting Equal Protection Clause violations against a school under § 1983 when the § 1983 claim is based on the same underlying facts as the Title IX claim. This is the holding that petitioner challenges and of which petitioner seeks review by this Court.

Petitioner respectfully suggests that this Court withhold decision on her petition for certiorari until after this Court's decision in *Davis v. Monroe County Board of Education* because of the effect that decision could have on the question presented for review. *See*, *infra*, p. 10. For example, as petitioner demonstrates in Point II.B. below, if this Court affirms the *Davis* decision, eliminating the Title IX peer-on-peer sexual harassment claim, reinstatement of petitioner's §

1983 claim would be required, since the passage of Title IX could not possibly have abolished petitioner's § 1983 claim if Title IX did not itself give rise to any claim for petitioner. *See*, *infra*, p. 10. In such an event, it would be appropriate for this Court to grant certiorari, summarily vacate the decision of the Court of Appeals and remand petitioner's case for further proceedings below. Alternatively, if *Davis* is reversed, the question presented by this petition would then be appropriate for a grant of certiorari and review by this Court.

Reasons for Granting the Writ

As the Court of Appeals expressly acknowledged, its decision, holding that Title IX precludes a plaintiff from bringing a claim for violation of her Equal Protection Clause rights through 42 U.S.C. § 1983, creates a three-to-three split among federal courts of appeals that have considered the same issue. The decision of the Court of Appeals is in direct and irreconcilable conflict with decisions of three other federal courts of appeals, *i.e.* the Courts of Appeals for the Sixth, Eighth and Tenth Circuits: *Lillard v. Shelby County Board of Education*, 76 F.3d 716 (6th Cir. 1996); *Crawford v. Davis*, 109 F.3d 1281 (8th Cir. 1997); *Seamons v. Snow*, 84 F.3d 1226 (10th Cir. 1996). The Courts of Appeals for the Third and Seventh Circuits, like the Court of Appeals in this case, reached the opposite conclusion. *See Pfeiffer v. Marion Ctr. Area Sch. Dist.*, 917 F.2d 779 (3rd Cir. 1990); *Waid v. Merrill Area Pub. Sch.*, 91 F.3d 857 (7th Cir. 1996).

In addition, the decision of the Court of Appeals constitutes an erroneous and unwarranted restriction of an important means of asserting constitutional rights. This Court has held that the burden of demonstrating § 1983 preclusion is a heavy one. *See, e.g., Blessing v. Freestone*, 520 U.S. 329 (1997). Further, the Court of Appeals' decision is in conflict with the rationale of *Smith v. Robinson*, 468 U.S. 992 (1984). *Smith v. Robinson* set forth a two-part test

for evaluating the issue whether a federal statute divests a plaintiff of her ability to assert a constitutional right through § 1983 arising from the same underlying facts. That test requires both (1) that the constitutional claims and the statutory claims be "virtually identical" and (2) that Congress intended to strip plaintiffs of constitutionally-based § 1983 claims by the passage of the federal statute. The decision of the Court of Appeals in this case rested on faulty analysis, relying on the similar "factual predicate" of the two claims, rather than analyzing the distinct nature of the separate Title IX and § 1983 claims.

Finally, the Court of Appeals has decided an important issue of federal law, involving the interrelationship of two federal statutes, Title IX and § 1983. The issue also directly concerns a plaintiff's ability to assert constitutional rights. This issue has not been, but should be, settled by this Court.

I. THE DECISION HAS CREATED A THREE-TO-THREE SPLIT AMONG THE FEDERAL COURTS OF APPEALS CONCERNING WHETHER TITLE IX DIVESTS A PLAINTIFF OF HER ABILITY TO BRING A CONSTITUTIONALLY-BASED § 1983 CLAIM ARISING FROM THE SAME SET OF FACTS.

With the decision of the Court of Appeals, there is now a three-to-three split among the federal courts of appeals concerning whether Title IX precludes constitutionally-based § 1983 claims arising from the same factual predicate. The Sixth, Eighth and Tenth Circuits have held that Title IX does not divest a plaintiff of the ability to bring a § 1983 claim for violation of constitutional rights. *See Lillard v. Shelby County Bd. of Educ.*, 76 F.3d 716, 723 (6th Cir. 1996) (holding that under the *Smith v. Robinson* analysis, Title IX cannot be held to supplant "independently existing constitutional claims"); *Crawford v. Davis*, 109 F.3d 1281, 1284 (8th Cir. 1997) (Title IX does not preclude § 1983

claims for the violation of independently existing constitutional rights "even if the same set of facts also gives rise to a cause of action for the violation of statutory rights"); *Seamons v. Snow*, 84 F.3d 1226, 1233-34 (10th Cir. 1996) (adopting Sixth Circuit's analysis in *Lillard*).

The Third and Seventh Circuits, like the decision of the Court of Appeals, have held the opposite, *i.e.* that Title IX does bar a plaintiff from bringing constitutionally-based § 1983 claims arising from the same set of facts. *See Pfeiffer v. Marion Ctr. Area Sch. Dist.*, 917 F.2d 779 (3rd Cir. 1990) (holding that Title IX precludes § 1983 claims for constitutional violations pursuant to *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981)); *Waid v. Merrill Area Pub. Sch.*, 91 F.3d 857, 862-63 (7th Cir. 1996) (following the *Pfeiffer* analysis, "a plaintiff may not claim that an instance of intentional discrimination simultaneously creates causes of action under Title IX and under § 1983 and the Equal Protection Clause"); *see also Williams v. The School Dist. of Bethlehem, PA*, 998 F.2d 168, 176 (3rd Cir. 1993) (reiterating *Pfeiffer* holding). The Court of Appeals noted the three-to-two split on the issue (App. at 15a-18a), but it adopted the holdings of the Third and Seventh Circuits, holding that there is no "constitutional rights exception" to avoid preclusion of the § 1983 claims based on Title IX's "comprehensive remedial scheme." App. at 18a.

The conflict among the federal courts of appeals is direct and irreconcilable on this important matter and should be resolved by this Court.

II. THE DECISION OF THE COURT OF APPEALS IS ERRONEOUS

A. The Court of Appeals Misapplied Supreme Court Doctrine.

In *Smith v. Robinson*, 468 U.S. 992 (1984), this Court established a two-part test for determining whether a federal statute preempts § 1983 claims based on constitutional deprivations. In that case, this Court held that if a plaintiff's constitutional claims are "virtually identical" to the statutory claims, then "[t]he question to be asked . . . is whether Congress intended that the [federal statute] be the exclusive avenue through which a plaintiff may assert those claims." *Id.* at 1009. The analysis in *Smith v. Robinson* requires *both* (1) that the constitutional claims and the statutory claims be "virtually identical" and (2) that Congress intended to strip plaintiffs of constitutionally-based § 1983 claims by the passage of the federal statute.

The Court of Appeals did not apply this Court's two-part analysis. Instead, the Court of Appeals applied the doctrine set forth by this Court in *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981), to determine whether a federal statute precludes a plaintiff from bringing a § 1983 claim based on a violation of the statute itself. The Court of Appeals failed to consider whether plaintiff's Title IX claims were "virtually identical" to her § 1983 constitutional claims. Rather, the Court of Appeals incorrectly held that "nowhere in the Supreme Court's doctrine is there a requirement that a court examine what sort of underlying cause of action is alleged in a § 1983 claim to determine whether it is foreclosed by the statute." (App. at 16a.). The Court of Appeals erred further by misapplying *Smith v. Robinson*, holding that "[l]ike *Smith*, the question is whether the same set of facts can provide a viable cause of action for both a Title IX and a § 1983 claim." (App. at 18a.). The identity of the factual predicates

underlying the claims is not the test under *Smith v. Robinson*. The proper question is whether the two *claims* are "virtually identical," not whether the set of facts upon which the claims are based are the same.

The Sixth, Eighth and Tenth Circuits recognized the distinction between virtually identical facts and virtually identical claims, and they each applied *Smith v. Robinson* faithfully. These courts held that Title IX does not divest a plaintiff of § 1983 claims for violations of independently existing constitutional rights, regardless of the identity of the underlying set of facts, because the constitutional claims are not "virtually identical" to Title IX claims. *See Lillard v. Shelby County Bd. of Educ.*, 76 F.3d 716, 723 (6th Cir. 1996) (Title IX does not "preempt independently existing constitutional rights, which have contours distinct from the statutory claim"); *Crawford v. Davis*, 109 F.3d 1281, 1284 (8th Cir. 1997) (Title IX does not preclude § 1983 claims for the violation of independently existing constitutional rights "even if the same set of facts also gives rise to a cause of action for the violation of statutory rights"); *Seamons v. Snow*, 84 F.3d 1226, 1233-34 (10th Cir. 1996) (adopting Sixth Circuit's analysis in *Lillard*).

The Seventh Circuit, like the Court of Appeals in this case, focused on the factual predicate underlying the claims, holding that "a plaintiff may not claim that a single set of facts leads to causes of action under both Title IX and § 1983." *Waid v. Merrill Area Pub. Sch.*, 91 F.3d 857, 862 (7th Cir. 1996). The Third Circuit held that § 1983 constitutional claims were barred by Title IX under the *National Sea Clammers* doctrine. *Pfeiffer v. Marion Ctr. Area Sch. Dist.*, 917 F.2d 779 (3rd Cir. 1990). Like the Second Circuit, these courts both failed to apply properly the *Smith v. Robinson* test, and both courts arrived at an erroneous result.

Proper application of this Court's two-part test compels the result that Title IX does not preclude constitutionally-based § 1983 claims, because (1) petitioner's § 1983 constitutional claims are not "virtually identical" to her Title IX claims, and (2) Congress did not intend to preclude constitutionally-based § 1983 claims when it passed Title IX.

B. Title IX and Equal Protection Clause Sexual Harassment Claims are not "Virtually Identical."

Far from being "virtually identical," Title IX claims and § 1983 Equal Protection claims are very different in both their scope and quality. The difference between the claims rests fundamentally on the fact that they were passed by Congress pursuant to two different constitutional powers. Congress passed § 1983 pursuant to its broad remedial powers granted by section 5 of the Fourteenth Amendment. *See Monroe v. Pape*, 365 U.S. 167, 171 (1961). Title IX, on the other hand, is "Spending Clause" legislation. *See Gebser v. Lago Vista Independent School District*, 118 S. Ct. 1989 (1998).

Last term, this Court held that because Congress enacted Title IX pursuant to its constitutional "spending power" and not pursuant to section 5 of the Fourteenth Amendment, Title IX "amounts essentially to a contract between the Government and the recipient of funds." *Id.* This fact relegates Title IX's proscription against sex discrimination to a "condition" and not an "outright prohibition." *Id. Gebser* further held that "[w]hen Congress attaches conditions to the award of federal funds under its spending power . . . we examine closely the propriety of private actions holding the recipient liable in monetary damages for noncompliance with the condition." *Id.* There is no such scrutiny for legislation passed pursuant to section 5 of the Fourteenth Amendment. Section 5 of the Fourteenth Amendment expressly grants

Congress broad authority to enforce the amendment's substantive provisions. *See* U.S. CONST. amend. XIV, § 5.

The universe of Equal Protection claims is not co-equal to the sphere of Title IX claims and can be broader. In fact, this Court has held that application of Title IX can itself violate the Equal Protection Clause. In *Mississippi University for Women v. Hogan*, 458 U.S. 718, 732 (1982), this Court held that Title IX did not bar a successful Equal Protection claim, even though that claim directly contradicted the exemption in Title IX permitting schools that "traditionally and continually from [their] establishment [have] had a policy of admitting only students of one sex" to continue that practice.

This Court's expected, forthcoming decision in *Davis v. Monroe County Board of Education*, could eliminate Title IX claims for peer-on-peer sexual harassment. *See Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390 (11th Cir. 1997) (*en banc*), *cert. granted*, 119 S. Ct. 29 (1998) (argued on January 12, 1999). If this Court affirms the Eleventh Circuit's opinion in the *Davis* case, plaintiffs such as petitioner could not state a claim under Title IX at all. Yet by the rationale of the Court of Appeals, petitioner would also be unable to bring a § 1983 claim for constitutional deprivations, because Title IX's "comprehensive" remedial scheme preempts such claims based on the same underlying facts. This result would be wrong, just as it would have been wrong to prevent the plaintiff in *Mississippi University for Women* to bring an Equal Protection claim because Title IX permitted the challenged discrimination.

Petitioner respectfully suggests that should this Court affirm the *Davis* decision, petitioner's § 1983 claim must be reinstated, because she could not have brought a claim under Title IX at all. Under these circumstances, no court could conclude that her Title IX claims and her Equal Protection Clause claims are "virtually identical." If this Court affirms

Davis, it would be appropriate in petitioner's case for this Court to grant certiorari, summarily vacate the decision of the Court of Appeals and remand the case for further proceedings below.

Regardless of this Court's forthcoming holding in *Davis*, the two claims are and will continue to be qualitatively different in fundamental ways. For example, the Title IX claim requires a sexual harassment plaintiff to prove that a school official with authority to institute corrective measures had "actual notice" of the harassment suffered by the plaintiff. *See Gebser v. Lago Vista Independent School District*, 118 S. Ct. 1989 (1998). Under § 1983, on the other hand, a sexual harassment plaintiff can establish an Equal Protection claim by showing that a "custom or usage" of the school district is the moving force behind the sex discrimination. *See, e.g., Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *Monell v. Dep't of Social Services*, 436 U.S. 658 (1978); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988). A § 1983 claim can also be established by demonstrating that a municipality's "failure to train" has led to constitutional violations. *See, e.g., City of Canton, Ohio v. Harris*, 489 U.S. 378, 388-89 (1989). Thus, under the § 1983 Equal Protection claim, basic elements of the cause of action are significantly different. The all-important "notice" issue under Title IX, for instance, is replaced by the "custom or usage" issue in the § 1983 action, with its fundamentally distinct requirements of proof. *Id.*

A § 1983 Equal Protection claim can also include elements of state law that are entirely absent under the law of Title IX. Under § 1983, the definition of an official with "final policymaking authority" is a question of state law. *See, e.g., Jett v. Dallas Ind. Sch. District*, 491 U.S. 701, 737 (1989). Title IX's evolving definition of a school official who has sufficient authority to impute knowledge of harassment to the school derives from federal case law

interpreting Title IX. *See, e.g., Gebser v. Lago Vista Independent School District*, 118 S. Ct. 1989 (1998). It is unlikely, to be sure, that these definitions will be uniform.

C. Congress Did Not Intend to Preclude Constitutionally-Based § 1983 Claims By Passing Title IX.

Congress did not intend to preclude constitutionally-based § 1983 claims when it passed Title IX. Nowhere in Title IX or its legislative history does Congress purport to declare Title IX the exclusive remedy for sexual harassment victims. The only express remedy for sex discrimination in Title IX is a provision relating to federal agencies' power to withhold federal funding for recipients who violate Title IX. Only in *Cannon v. University of Chicago*, 441 U.S. 677 (1979) was it made clear that private citizens have a cause of action under Title IX, and it was not until this Court's holding in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992) that a damages remedy was established.

Title IX's express remedial scheme is therefore meager at best, and the judicially-implied remedies can fairly be called standard. Title IX's remedial scheme contains none of the "carefully tailored administrative and judicial mechanism[s]" set out in the Education for the Handicapped Act analyzed in *Smith v. Robinson*. Far from constituting the single, ultimate protection from sexual harassment in schools, Title IX does not provide any remedy against individual defendants, and will perhaps be equally impotent in cases involving peer-on-peer sexual harassment.

It also requires considerable imagination to believe that Congress would pass legislation designed to preempt important § 1983 Constitutional claims by invoking its "spending power" rather than its broader remedial powers granted by section 5 of the Fourteenth Amendment when passing the legislation.

III. THE ISSUE PRESENTED IS AN IMPORTANT ISSUE OF LAW.

Finally, the issue presented should be settled by this Court because it is an important issue of law, involving the interrelationship between two federal statutes and directly affecting the ability of plaintiffs to assert their constitutional rights. The rule of law set forth by the Court of Appeals construes Title IX ironically to weaken the legal means available to redress the problem of sexual harassment. The decision is not consistent with this Court's jurisprudence or Congressional intent and should be reviewed by this Court.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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March 24, 1999

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 1997

(Argued December 12, 1997 Decided December 31, 1998)

Docket No. 97-7495

EVE BRUNEAU, a Minor, by and through her Guardians ad Litem, Pat Schofield and John Bruneau,

Plaintiff-Appellant,

—v.—

SOUTH KORTRIGHT CENTRAL SCHOOL DISTRICT AND SOUTH KORTRIGHT SCHOOL BOARD,

Defendants-Appellees.

Before:

OAKES, CARDAMONE, AND PARKER,

Circuit Judges.

Plaintiff Eve Bruneau sued South Kortright Central School District, its School Board and certain members of its staff for failing to remedy hostile environment sexual harassment, which she claims she experienced at the hands of her sixth grade male classmates. She asserted claims under both Title IX, 20 U.S.C. § 1681 (1994) and 42 U.S.C. § 1983

(1994) for violations of her rights secured by Title IX itself and the Equal Protection Clause of the Fourteenth Amendment. The United States District Court for the Northern District of New York dismissed her § 1983 claim pursuant to Fed. R. Civ. P. 56 in an order dated July 25, 1996 (McAvoy, C.J.) and entered judgment against plaintiff on November 25, 1996 (Kahn, J.) following a general jury verdict on the Title IX claim. Plaintiff appeals from the order and judgment.

Affirmed.

Judge Oakes concurs in a separate opinion.

BROOKS R. BURDETTE, New York, New York (William H. Gussman, Jr., Schulte Roth & Zabel LLP, New York, New York; Merrick T. Rossein, Steel, Bellman, Ritz & Clark, New York, New York, of counsel), *for Plaintiff-Appellant*.

FRANK W. MILLER, East Syracuse, New York (Benjamin J. Ferrara, Craig M. Atlas, Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C., East Syracuse, New York, of counsel), *for Defendants-Appellees*.

Janet Axelrod, General Counsel, National Education Association of New York (Richard N. Aswad, James F. Haley, Jr., Aswad & Ingraham, Binghamton, New York, of counsel), *filed a brief amicus curiae on behalf of National Education Association of New York*.

Dennis G. O'Hara, Patricia R. Hoover, O'Hara & O'Connell, Syracuse, New York, of counsel, *filed a brief amicus curiae for The New York State Council of School Superintendents.*

William R. Yeomans, Acting Assistant Attorney General, Dennis J. Dimsey, Linda F. Thome, U.S. Department of Justice, Washington, D.C., of counsel, *filed a brief amicus curiae for the United States.*

Nicole L. Guéron, Friedman & Kaplan LLP, New York, New York; Martha F. Davis, Yolanda S. Wu, Julie Goldscheid, NOW Legal Defense and Education Fund, New York, New York, of counsel, *filed a brief amici curiae for NOW Legal Defense and Education Fund, ACLU Women's Rights Project, Connecticut Women's Education and Legal Defense Fund, Equal Rights Advocates, National Women's Law Center, Northwest Women's Law Center, Texas Civil Rights Project, Title IX Advocacy Project, and Women's Legal Defense Fund.*

CARDAMONE, *Circuit Judge*:

This appeal concerns alleged sexual harassment in a public school. The plaintiff, Eve Bruneau, was at the time of the events recited an 11-year-old sixth grade student in a rural upstate New York school. Her complaint asserts that her male classmates created a hostile educational environment by subjecting her and other female students in her class to verbal and physical sexual harassment. The defendant School maintained a specific policy setting forth its belief that students have an absolute right to be free from sexual

harassment in the school, and that such freedom is an inherent part of every student's civil rights.

Sixth grade students experience that mysterious in-between time of life where they are too old for Barbie dolls and toy soldiers, but too young for high heels and drivers' licenses. Even adults are unsure how to interpret pre-teen behavior. Plaintiff on the one hand produced an expert witness who, after conducting a national study on sexual harassment in public schools, opined that such conduct occurs as early as the sixth grade, and that sexual harassment in grades six and higher is very prevalent. On the other hand, plaintiff's male sixth grade teacher, testifying for the School, stated that he did not believe any of the conduct charged to the sixth grade boys constituted sexual harassment. Although he conceded such behavior was inappropriate, it could not be, in his opinion, sexual harassment due to the young age of the students involved.

The jury in this case had to decide not only whether the conduct alleged was sexual harassment or merely childish misbehavior, but also whether the school could be held liable for such conduct. With the jury having absolved the school of liability, plaintiff seeks redress in this Court. Although the record suggests that the actions of plaintiff's male classmates were no doubt hurtful to those female students who were the targets of such conduct, the record also reveals that the trial court committed no error sufficient for us to vacate the verdict.

BACKGROUND

A. *Facts*

Eve Bruneau began the 1993-94 school year as a student in William Parker's sixth grade class in the South Kortright Central School (School), a public school receiving federal financial assistance. She turned 12 years old in November 1993. Her complaint alleges that she was subjected to a sexually hostile educational environment and that responsible

school officials failed to remedy the situation, leading to her eventual withdrawal from the School in March 1994. The jury heard the following testimony at trial.

Bruneau asserted she was the victim of continuous verbal and physical sexual harassment by her male classmates from the start of the school year until her withdrawal six months later. She claimed this harassment created an intimidating, abusive and hostile learning environment, which interfered with her education and caused her to feel depressed. According to Bruneau, the male students regularly called her and her female classmates sexually derisive names such as bitches, prostitutes, whores, lesbians and lesbos. She further alleged that she and the girls experienced bra snapping, hair pulling, spitting, shoving of paper down their blouses, punching, pushing and other physical abuse.

On one particular occasion in October, a male student called plaintiff a "dog-face bitch." Later that day Patricia Schofield, Bruneau's mother, found plaintiff in her room crying and upset by the remark. This discovery prompted Schofield to take action. She reported the incident and others to Parker, her daughter's teacher, during a regularly scheduled parent-teacher conference on November 3. The teacher expressed his concern and assured Schofield this type of behavior would not reoccur. After he failed to speak with Bruneau or the boy involved in the incident, Schofield met with Parker again and demanded he address the matter. Parker thereafter brought plaintiff and the male student together and asked the student whether he had called Bruneau a "dog-face bitch." According to Bruneau, the student responded "no," her teacher unsuccessfully tried to elicit an apology, he then dismissed the student and told her that "people are going to call you names all your life and you'll just have to deal with it." Although Parker testified that the male student initially denied making the comment, Parker said the student eventually apologized to Eve, after which the teacher extended words of comfort to Bruneau.

Meanwhile, Schofield approached Ann Cole during a class field trip. Cole, who at the time was completing a Master's Degree in Education Counseling, interned as a guidance counselor-in-training at the School under the supervision of Deborah Joyal-Reinisch, a full time counselor. Cole thereafter met with girls from Parker's class to investigate Schofield's complaints. Having learned that the sixth grade boys regularly called the girls names and subjected them to unwanted physical touching, she reported these findings to Joyal-Reinisch. Thereafter Cole contacted Parker, conveyed Schofield's concerns to him, and convened a meeting between him and the girls to address the problem—all with Joyal-Reinisch's knowledge. The meeting occurred on November 16. Going around the room, the girls, including Bruneau, took turns describing various incidents to Parker. At the meeting's conclusion, Parker vowed to remedy the situation by moving the students' desks around.

Displeased with Parker's efforts, Schofield met on November 19 with Lynda Race, the School's assistant superintendent, to inform her of the situation in the sixth grade classroom. During that meeting, she reported Bruneau's and the other girls' complaints about the boys' behavior and Parker's response. When Race relayed those complaints back to Parker, Parker confronted Schofield and told her that if in the future she had complaints about his class, she should deal directly with him.

Bruneau claims the boys' behavior continued and, in fact, worsened in early 1994. In February 1994 Patrick Clark replaced Joyal-Reinisch as the full time guidance counselor at the School and instituted a program he later described as "sexual harassment prevention" in plaintiff's sixth grade class. That program proved ineffective.

After several unsuccessful attempts in making an appointment, Schofield eventually did meet with assistant superintendent Race again on Friday, March 25, 1994 to follow up their earlier November 19, 1993 meeting. Plaintiff

and her father also were present. The meeting began with Bruneau describing the events that had occurred in the classroom and their effect on her psyche. Schofield asked that her daughter be removed from Parker's class and transferred to the other sixth grade class at the School. Race advised Schofield that only the school board could move Bruneau, and after Race further stated that she had never observed Parker's class nor contacted the parents of any of the alleged offending students, the meeting ended.

That evening, Schofield visited the home of Richard Stinson, the school board vice president. She talked with Stinson in detail about the boys' behavior in Parker's classroom and the lack of remedial action. Schofield informed Stinson of her request to transfer Bruneau and the substance of Race's response. Stinson responded that Race could affect a transfer without board approval if a parent requested it.

The following Monday, March 28, Schofield and her husband took matters into their own hands. They went to the school, and she informed Parker that Bruneau would no longer be in his class, collected her daughter's books and brought them over to the other sixth grade class. Upon discovering Schofield's actions, Race not only insisted Bruneau return to Parker's class, but later called to report that the school board had rejected the transfer. Faced with this demand, Bruneau and her parents decided she would withdraw from the School and enter Stamford Central School, located in a neighboring community where Bruneau and her family actually resided.

B. *Prior Legal Proceedings*

Plaintiff initially brought the instant action in the United States District Court for the Northern District of New York on July 13, 1994, seeking declaratory, injunctive and monetary relief. Chief Judge Thomas J. McAvoy appointed Schofield as Bruneau's guardian *ad litem* for purposes of the suit. On December 27, 1994 plaintiff filed an amended

complaint, which named South Kortright Central School District (School or School District), Lynda Race, William Parker and the South Kortright School Board as defendants. Her amended complaint set forth two separate causes of action against the defendants. First, plaintiff asserted a claim under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (Title IX), against only the School District for failing to remedy the hostile environment created by peer-on-peer sexual harassment. Second, Bruneau alleged a 42 U.S.C. § 1983 claim against all the defendants. As part of her § 1983 claim, she averred that defendants denied her right to be free from a hostile educational environment as guaranteed by Title IX and her right to equal protection under the Fourteenth Amendment of the Constitution.

On June 12, 1996 defendants moved for summary judgment and the dismissal of plaintiff's amended complaint. Chief Judge McAvoy granted partial summary judgment in favor of defendants, dismissing the § 1983 claim in its entirety. *See Bruneau v. South Kortright Cent. Sch. Dist.*, 935 F. Supp. 162, 177-79 (N.D.N.Y. 1996). The district court ruled that Title IX subsumed Bruneau's § 1983 claim, finding that Congress intended to preclude a § 1983 remedy for Title IX violations. *See id.* at 178-79. Moreover, the district court suggested that even if plaintiff's § 1983 claim were sustained, Race and Parker would be entitled to qualified immunity because whether peer-on-peer harassment in a school setting violated Title IX was not clearly established at the time the events of the case occurred. *See id.* at 179.

Defendants' motion for summary judgment on plaintiff's Title IX claim was denied because various material issues of fact were present. *See id.* at 177. In permitting the Title IX claim to advance to trial, the district court cautioned plaintiff that to sustain her Title IX claim against the School District for peer-on-peer harassment, she would need to show the School had actual notice of the alleged harassing conduct. *See id.* at 174.

C. *Jury Trial*

A jury trial began on November 4, 1996 before District Judge Lawrence Kahn. Despite plaintiff's request that Parker and Race be excluded from the courtroom, the district judge allowed them to remain present for the entire trial.

At the conclusion of the trial, the district court charged the jury that to demonstrate liability under Title IX, Bruneau must prove six elements

1) She was a member of a protected group.
2) She was subject to unwelcome sexual harassment in the form of conduct or comments.
3) The harassment was based on her gender.
4) The harassment unreasonably created an intimidating, hostile, abusive or offensive educational environment.
5) The School District had actual notice of the sexual harassment conduct (the notice element).
6) The School District failed to take corrective action to remedy the discriminatory conduct and hostile learning environment.

The district court earlier had rejected Bruneau's requests to charge the jury that (a) constructive (as opposed to actual) notice of peer-on-peer sexual harassment was sufficient to establish liability and (b) any corrective action to remedy the situation must have been "prompt" to avoid liability.

With respect to the notice element, the district court determined the School could be held liable only if certain employees or agents had actual knowledge of the alleged harassment. It reasoned that to impute notice to the School, a school official must have been sufficiently aware of the conduct and armed with direct authority to remedy it. Accordingly, the jury charge listed only three persons who were eligible to receive notice on behalf of the School: William Parker (sixth grade teacher), Deborah Joyal-Reinisch (full time guidance counselor) and Lynda Race (assistant

school superintendent). Other persons involved at the School, such as Richard Stinson (school board vice president), Patrick Clark (successor guidance counselor) and Ann Cole (guidance counselor-in-training) were excluded from the list.

Following the jury charge, the trial court issued a general verdict form, directing the jury to find for either plaintiff or the School District. The School earlier had requested a special verdict form be used to permit the jury to address each of the six individual elements of the Title IX claim. Bruneau's counsel, however, objected and urged the use of the trial court's proposed general verdict form.

The jury returned a general verdict in favor of the School on November 21, and judgment was entered accordingly on November 25, 1996. Plaintiff moved pursuant to Fed. R. Civ. P. 59 to set aside the verdict and judgment, and grant a new trial. When that motion was denied, Bruneau appealed. We affirm.

DISCUSSION

Bruneau appeals from both the July 1996 order dismissing her § 1983 claim, and the November 1996 unfavorable jury verdict and the resulting judgment. In this latter aspect of the appeal, she asserts the district court erred by: charging the jury that plaintiff must prove actual notice to establish Title IX liability and that only Parker, Race and Joyal-Reinisch could receive such notice on behalf of the School; refusing to charge that corrective action to remedy the hostile environment must be taken "promptly"; and refusing to sequester Parker and Race. We discuss these issues in order.

I Dismissal of Bruneau's § 1983 Cause of Action

Bruneau's § 1983 claim alleged that the School District, School Board, Race and Parker deprived her of her rights guaranteed by Title IX and the Equal Protection Clause of the Fourteenth Amendment. The question of the extent to which Title IX subsumes a § 1983 claim is one of first impression in

this Circuit. To aid in our discussion, we divide our analysis here into two parts: the first part considers plaintiff's attempt to enforce Title IX through § 1983; the second part examines the extent to which she based her § 1983 cause of action on an independent constitutional right, *i.e.*, the Equal Protection Clause. However, we need not address the extent to which Title IX subsumes a § 1983 claim against the individual defendants Race and Parker because in any event, they are entitled to qualified immunity as is made clear in the following paragraphs, before we enter into our two-part analysis.

The test for determining the applicability of qualified immunity is objective. "If the law at [the time of the official's actions] was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In other words, the right a government official allegedly violated is clearly established when its contours are sufficiently plain so that an official might reasonably be said to know that what he is doing violates that right. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

Here, Bruneau alleges the right to be free from a sexually hostile learning environment created by peer-on-peer sexual harassment. For purposes of qualified immunity analysis, the question is whether in the fall of 1993 such right was so clearly established under Title IX and the Equal Protection Clause that the school officials had a legal duty to identify peer-on-peer sexual harassment in the school environment and remedy it. *See Doe v. Petaluma City Sch. Dist.*, 54 F.3d 1447, 1451 (9th Cir. 1996).

The law does not clearly impose a duty on school officials under Title IX or the Fourteenth Amendment to stop peer sexual harassment. Indeed, there are no court of appeals cases before 1998 holding school officials potentially liable

for peer sexual harassment in the school environment. Even now, there is disagreement among the circuits as to whether a school district and school officials may be held liable for sexual harassment where the officials are not directly involved in the harassment. *Compare Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1013 (5th Cir.), *cert. denied*, 1175 S. Ct. 165 (1996) (no liability absent allegations that school district itself directly discriminated based on sex), *and Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186 (11th Cir. 1997) (en banc) (same), *with Oona, R.S. v. McCaffrey*, 143 F.3d 473, 477 (9th Cir. 1998) (school officials potentially liable for discriminatory actions in failing to remedy a known hostile environment), *and Doe v. University of Illinois*, 138 F.3d 653, 661-62 (7th Cir. 1998) (plaintiffs may state hostile environment claim against school officials for student-to-student harassment).

We hold that it was not clearly established law in the fall of 1993 that a § 1983 claim could be stated against individual officials for failure to prevent peer sexual harassment among students. Thus, defendants Race and Parker are entitled to a dismissal based on the defense of qualified immunity.

A. *Section 1983 Claim Alleging Violations of Title IX*

We turn now to our two-part analysis. Plaintiff alleges the defendants denied her right under Title IX to be free from a hostile school environment created by peer-on-peer sexual harassment, and seeks to use § 1983 to enforce this right. It is familiar law that § 1983 does not create substantive rights, but simply provides the procedural mechanism through which a plaintiff may bring a suit for violation of a federal right. Section 1983 supplies a cause of action to a plaintiff when a person acting under color of state law deprives that plaintiff of any "rights, privileges, or immunities secured by the Constitution and laws [of the United States]." 42 U.S.C. § 1983 (1994). In *Maine v. Thiboutot*, 448 U.S. 1 (1980), the Supreme Court explained that individuals could sue under § 1983 for violations of federal statutory, as well as

constitutional, law. *See id.* at 4. But § 1983 is not available for violations of all federal statutes. In *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981), the Supreme Court stated that "[w]hen the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983." *Id.* at 20. Applying the *Sea Clammers* doctrine to Title IX, we think—for two reasons—that Title IX contains a sufficiently comprehensive enforcement scheme so as to foreclose the use of § 1983 to implement its provisions.

First, Title IX establishes a complex administrative enforcement scheme to ensure compliance with its provisions. Under this plan, an injured individual may file a complaint with the Department of Education, *see* 34 C.F.R. § 100.7(b) (1997), which then must promptly investigate the allegations, *see id.* § 100.7(c). Absent a complaint, the Department is authorized to conduct its own periodic compliance reviews. *See id.* § 100.7(a). If the Department either deems the allegations in a complaint to have merit or discovers violations through its own review, it will inform the institution of the violation and attempt to resolve the matter informally. *See id.* § 100.7(d). When all else fails, the Department may effect compliance by terminating the institution's federal funding following an administrative hearing. *See id.* § 100.8. The original complainant has a right to petition to become an *amicus curiae* at a hearing held to decide whether to terminate federal financial assistance. *See id.* § 101.23.

Second, in addition to these administrative remedies, the Supreme Court has ruled that Title IX implicitly permits an individual to bring a private cause of action. *See Cannon v. University of Chicago*, 441 U.S. 677, 709 (1979). Once in court, the Title IX plaintiff has access to a full panoply of remedies including equitable relief and compensatory damages. *See Franklin v. Gwinnett County Pub. Sch.*, 503

U.S. 60, 73-76 (1992) (finding that Congress did not limit the remedies available under Title IX, thereby permitting money damages). The availability of a private judicial remedy is further evidence of a congressional intent to supplant a § 1983 remedy. *See Wright v. City of Roanoke Redevelopment and Hous. Auth.*, 479 U.S. 418, 427 (1987); *Marshall v. Switzer*, 10 F.3d 925, 930 (2d Cir. 1993).

We recognize that some of our sister circuits consider the implied private right of action as outside the statutory enforcement scheme. *See Crawford v. Davis*, 109 F.3d 1281, 1284 (8th Cir. 1997); *Lillard v. Shelby County Bd. of Educ.*, 76 F.3d 716, 723 (6th Cir. 1996). These circuits limit consideration of available statutory remedies under the *Sea Clammers* doctrine to those expressly provided for by Title IX itself. Absent an express provision for a private right of action, they hold the existence of Title IX's administrative remedies is simply a procedure for terminating federal financial assistance for institutions violating Title IX, which—as evidenced by the *Cannon* Court's decision to extend the option of judicial remedies by implication—does not itself provide a sufficiently comprehensive enforcement scheme to demonstrate Congress' aim to displace § 1983 suits.

We do not adopt this narrow reading of the remedies available under Title IX's statutory enforcement scheme. The ultimate question posed by the *Sea Clammers* doctrine is whether Congress *intended* to preclude § 1983 suits when it enacted the relevant federal statute. *See Smith v. Robinson*, 468 U.S. 992, 1012 (1984) ("[Section] 1983 is a statutory remedy and Congress retains the authority to repeal it or replace it with an alternative remedy. The crucial consideration is what Congress intended."). Accordingly, we must look to more than just the express remedies contained within the statute to ascertain fully Congress' purpose.

In *Wright*, the High Court held "[u]nder [*Sea Clammers*], if there is a state deprivation of a 'right' secured by a federal

statute, § 1983 provides a remedial cause of action unless the state actor demonstrates by express provision or *other specific evidence from the statute itself* that Congress intended to foreclose such private enforcement." *Id.* at 423 (emphasis added). This "other specific evidence from the statute itself" includes a statute's legislative history. *See, e.g., Smith*, 468 U.S. at 1009 (using the provisions of a statute and its legislative history to determine whether Congress intended to limit claims to those that could be brought under the statute's administrative and judicial mechanism).

Here, the Supreme Court has found that Title IX's legislative history clearly indicates Congress' plan to create a private right of action in the statute as a remedy to secure the enforcement of its provisions. *See Cannon*, 441 U.S. at 694. Thus, we include this implied right of action as part of Title IX's enforcement scheme. *See also Waid v. Merrill Area Pub. Sch.*, 91 F.3d 857, 862-63 (7th Cir. 1996); *Pfeiffer v. Marion Ctr. Area Sch. Dist.*, 917 F.2d 779, 789 (3d Cir. 1990).

In sum, given Title IX's administrative and judicial remedies, we believe it was Congress' scheme that a claimed violation of Title IX be pursued under Title IX and not § 1983.

B. *Section 1983 Claim Alleging Violations of the Equal Protection Clause*

Bruneau further alleges that even if Title IX is sufficiently comprehensive to preclude her § 1983 claim for violations of that statute, Title IX does not bar her § 1983 claim for violations of the Equal Protection Clause of the Fourteenth Amendment. She maintains this constitutional right provides an independent basis for maintaining her § 1983 claim.

Plaintiff finds support for this proposition in the Sixth, Eighth and Tenth Circuits, which have carved out an exception to the *Sea Clammers* doctrine for constitutional rights. These circuits allow a Title IX plaintiff to bring a

separate § 1983 action predicated on a violation of a constitutional right. For example, the Eighth Circuit concluded that *Sea Clammers* does not prevent a Title IX plaintiff from asserting an additional cause of action under § 1983 for violations of the Equal Protection Clause, even when the same set of facts gives rise to the claimed violation of the statutory right. *See Crawford v. Davis*, 109 F.3d at 1284. Similarly, the Sixth Circuit declined to apply *Sea Clammers* to a case alleging both a Title IX claim and a § 1983 cause of action for violations of plaintiff's Fourteenth Amendment rights. *See Lillard v. Shelby County Bd. of Educ.*, 76 F.3d at 722-24. The Sixth Circuit reasoned in part that plaintiff's § 1983 action did not purport to gain remedies unavailable under Title IX, but instead sought to enforce distinct and independent substantive due process rights. *See id.* at 722-23. Likewise, the Tenth Circuit adopted the analysis set forth in *Lillard* and ruled that *Sea Clammers* did not bar a plaintiff from bringing causes of action under both Title IX for violations of the statute and § 1983 for violations of constitutional rights. *See Seamons v. Snow*, 84 F.3d 1226, 1233-34 & n.8 (10th Cir. 1996).

We see nothing in *Sea Clammers* that would support a constitutional rights exception. *Sea Clammers* analyzes the alternative remedies available to a plaintiff to determine whether Congress aimed to replace § 1983 as an available remedy. *See* 453 U.S. at 13, 20. The exception that the Sixth, Eighth and Tenth Circuits have carved out shifts the focus of *Sea Clammers* toward the nature of the underlying right that a plaintiff asserts. Not surprisingly, nowhere in the Supreme Court's doctrine is there a requirement that a court examine what sort of underlying cause of action is alleged in a § 1983 claim to determine whether it is foreclosed by the statute. In short, no special exemption is provided for constitutional claims.

The Supreme Court, in fact, found quite to the contrary when it applied *Sea Clammers* to a case involving an

underlying constitutional claim. The plaintiff in *Smith v. Robinson* suffered from cerebral palsy and a variety of physical and emotional handicaps. 468 U.S. 992. When defendants terminated his educational funding, plaintiff sued, asserting, among others, a claim under the Education of the Handicapped Act, 20 U.S.C. § 1400 *et seq.* (EHA), and a § 1983 Equal Protection claim. *See* 468 U.S. at 994. Applying the *Sea Clammers* doctrine, the Supreme Court determined the EHA contained a sufficiently comprehensive enforcement scheme, *see id.* at 1009-12, for it to hold

> Congress perceived the EHA as the most effective vehicle for protecting the constitutional right of a handicapped child to a public education. We conclude, therefore, that where the EHA is available to a handicapped child asserting a right to a free appropriate public education, *based either on the EHA or on the Equal Protection Clause of the Fourteenth Amendment*, the EHA is the exclusive avenue through which the child and his parents or guardian can pursue their claim.

Id. at 1013 (emphasis added).[1]

The same reasoning governs the instant case. Plaintiff seeks to maintain her § 1983 cause of action for violations of the Equal Protection Clause. Her amended complaint states

> Defendants have discriminated against plaintiff in the educational activities and programs of the South Kortright School on the basis of her sex in violation of the Fourteenth Amendment of the United States Constitution and 42 U.S.C. § 1983. All defendants had a duty to provide and ensure an educational environment

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[1] Although Congress amended the EHA so that the statute now clearly provides that it is not the exclusive remedy, *see* 20 U.S.C. § 1415(f) (1994), thereby effectively overruling *Smith*, the analysis utilized by the Supreme Court remains relevant.

> for the Plaintiff, free of sexual innuendo, intimidation and discriminatory animus, and to enforce the rules, regulations, and laws necessary to protect her and other female students from acts of sexual harassment.

First Am. Compl. ¶55. Essentially, she alleges the defendants violated her Equal Protection right by failing to remedy the situation at the School. Therefore, her § 1983 claim is based on the same factual predicate as her Title IX claim. Like *Smith*, the question is whether the same set of facts can provide a viable cause of action for both a Title IX and a § 1983 claim. *See* 468 U.S. at 1009 (acknowledging that plaintiff's Equal Protection claim was virtually identical to the statutory claim).

Although Bruneau has a constitutional right to an educational environment free of sexual harassment, we have already determined that Title IX provides the exclusive remedial avenue. Congress intended Title IX to be the appropriate vehicle to protect all of plaintiff's rights arising in this situation as Title IX's enforcement scheme fully addresses her constitutional claims against the School District and School Board. Consequently, we hold that plaintiff may not maintain her § 1983 claim and thereby bypass the comprehensive remedial scheme created in Title IX.

In so holding, we join the Third and Seventh Circuits in recognizing no constitutional rights exception to the *Sea Clammers* doctrine. These circuits have held that a § 1983 claim based on the Equal Protection Clause is subsumed by Title IX. *See Waid v. Merrill Area Pub. Sch.*, 91 F.3d at 862; *Pfeiffer v. Marion Ctr. Area Sch. Dist.*, 917 F.2d at 789. We agree with this view. Having already presented her Title IX cause of action to a jury and lost, Bruneau is now relegated to challenging matters that occurred at her Title IX trial.

II Appeal From the Title IX Verdict

A. *The Notice Element of the Jury Charge*

In her brief to this Court and at oral argument, plaintiff challenges the district court's jury charge on two grounds. She first alleged it was error to instruct the jury that actual notice—as opposed to constructive notice—must be proved. Since that time, however, the Supreme Court has ruled that a high school student, who had a sexual relationship with a teacher but did not report it to school officials, could recover damages from the school district only if it had actual notice of and was deliberately indifferent to the teacher's misconduct. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 118 S. Ct. 1989, 2000 (1998). In light of this ruling, Bruneau's counsel advised this panel by letter dated June 26, 1998 that the Supreme Court opinion answers the question of what is the appropriate standard of notice, and therefore we must affirm the district court's holding on that issue. We agree.

Bruneau's second ground for attack is that the district court erred by limiting the class of persons eligible to receive notice on behalf of the School District to William Parker, Deborah Joyal-Reinisch and Lynda Race. Bruneau contends the general verdict for defendants must be reversed because we cannot be certain what effect, if any, this error may have had upon the jury's verdict. Of course, by having insisted on a general verdict form, plaintiff now deprives us of the opportunity to review specific jury findings relevant to issues she raises on appeal. In seeking a reversal, she consequently must rely upon the general verdict rule.

1. General Verdict Rule

The general verdict rule was developed to determine the viability of a verdict in favor of a plaintiff when alternative theories for imposing liability are given to the jury, but one of those theories should not have been submitted. In such cases, the usual course is to reverse the verdict and order a new trial because it is impossible to determine whether the invalid

theory was or was not the sole basis for the verdict. *See, e.g., United N.Y. and N.J. Sandy Hook Pilots Ass'n v. Halecki*, 358 U.S. 613, 619 (1959) (reversing a general verdict and ordering a new trial because one of two theories of liability submitted to the jury was invalid and there was "no way to know that the invalid [theory] was not the sole basis for the verdict"); *Katara v. D.E. Jones Commodities, Inc.*, 835 F.2d 966, 970-71 (2d Cir. 1987) (finding that one of several theories of liability submitted to the jury was unsupported by the evidence and therefore reversing the general verdict); *Morrissey v. National Maritime Union of Am.*, 544 F.2d 19, 26 (2d Cir. 1976) ("The general rule is that when one of the two claims that have been submitted to the jury should not have been submitted, a general verdict . . . cannot stand."). The rule has also applied where, as in Bruneau's case, the verdict was in favor of the defendant. *See BAII Banking Corp. v. UPG, Inc.*, 985 F.2d 685, 704 (2d Cir. 1993).

The case at bar presents a somewhat unique twist to the general verdict rule. Here the trial court submitted only one theory of liability to the jury. Nonetheless, the underlying rationale of the general verdict rule applies with equal force. We are confronted with the same uncertainty problem as in those cases where multiple theories are submitted. Since Bruneau bore the burden of proof on all six elements of her Title IX claim, the School would prevail I if the jury found she failed to establish any one of them. Because of the general verdict, we cannot be certain which element or elements the jury thought plaintiff failed to prove. For example, we do not know whether the jury found Bruneau failed to establish the disputed notice element of her Title IX claim and, if so, whether that was the sole reason the jury denied her relief.

Yet, the general verdict rule does not mandate reversal in all circumstances. We have specifically recognized the possibility of applying harmless error analysis where appropriate to avoid the usual course of reversal and new

trial. Harmless error arises when we are sufficiently confident that the verdict was not influenced by an error in the jury charge. *See Morrissey*, 544 F.2d at 27. We look to see "what effect the error had *or reasonably may be taken to have had* upon the jury's decision." *Kotteakos v. United States*, 328 U.S. 750, 764 (1946) (emphasis added). That is to say, harmless error analysis does not require absolute certainty with respect to what effect the error had upon the verdict. *See id.* at 764-65 ("If, when all is said and done, [a reviewing court] is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress.").

In short, when we are able to conclude that the verdict was not substantially influenced by the alleged error, then we may be quite confident the objecting party's rights were not prejudiced and may uphold the general verdict. *See id.; Morrissey*, 544 F.2d at 27; *see also Asbill v. Housing Auth. of the Choctaw Nation of Ok.*, 726 F.2d 1499, 1504 (10th Cir. 1984) (recognizing the harmless error exception).

2. Confidence in the Jury's Verdict

In the present case, we are convinced that even had the district court expanded the group of persons eligible to receive notice on behalf of the School, the jury would have reached the same verdict. Thus, this alleged error in the charge cannot now form the basis for reversing the general verdict in favor of the defendants. *Cf. Kotteakos*, 328 U.S. at 764-65.

As an initial consideration, plaintiff proffered ample proof for the jury to have found in her favor on the notice element as it was charged, *i.e.*, that William Parker, a person listed as eligible to receive notice on behalf of the School, in fact, received actual notice of the alleged discriminatory conduct in his classroom. Plaintiff testified Parker was present and actually saw the conduct she complained of.

Parker himself confirmed he observed name calling, pushing and shoving between his students on numerous occasions. His personal observations alone are sufficient to establish his actual notice.

Further, the jury heard undisputed testimony that several persons notified Parker of the hostile conduct. Parker conceded that staff members in the School had communicated the problem to him, and that plaintiff and the other girls in the class told him at their November meeting about the boys' conduct. One girl testified that female students continued to complain to Parker after the meeting. In addition, Ann Cole stated that following the November meeting, she advised Parker that the girls did not believe the situation in the classroom had improved. Bruneau's mother, Ms. Schofield, also met with Parker to voice her concerns. Hence, we can be quite confident Bruneau's Title IX claim did not fail for a lack of actual notice to an authorized agent of the defendant School, even taking into account the shortened list of agents given by the trial court.

To the extent the jury ruled against Bruneau and in light of the School's concession that Bruneau is a member of a protected class, we believe jurors must have found Bruneau failed to prove one of the other four remaining elements of her Title IX claim. For example, the jury could have found that even if harassment had occurred, it was not based on sex due to the age of plaintiff's male peers. *See* Monica L. Sherer, *No Longer Just Child's Play: School Liability Under Title IX For Peer Sexual Harassment*, 141 U. Pa. L. Rev. 2119, 2130 (1993) ("That a student's behavior be fairly recognized as flirting or teasing rather than sexual harassment is a legitimate concern because such a mischaracterization may discourage healthy social/personal relationships."). Or, jurors might have found that defendants took appropriate corrective action to remedy the alleged conduct and hostile environment. These legitimate, alternative explanations for the verdict bolster our confidence in concluding that the refusal to expand the list of

the School's agents eligible to receive notice had no influence on the outcome of the trial.

B. *Refusal to Charge that Remedial Action Must Be Taken "Promptly"*

Title IX prohibits sex discrimination in education programs receiving federal financial assistance. It states

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .

20 U.S.C. § 1681 (a) (1994). This prohibition requires an educational institution, once it has notice of the existence of a hostile educational environment created by peer-on-peer sexual harassment, to take steps to remedy the situation. *Cf. Karibian v. Columbia Univ.*, 14 F.3d 773, 780 (2d Cir. 1994) (explaining that under Title VII, an employer will be liable for co-worker sexual harassment if it "knew of the harassment but did nothing about it"). Accordingly, the district court charged the jury that Bruneau must prove the "defendant [School District] failed to take corrective action to remedy the discriminatory conduct and hostile learning environment." It further instructed the jury to consider what steps the School took and whether those steps were appropriate and effective. Bruneau argues that the district court erred by refusing to charge the jury that Title IX requires the School District to take "prompt" remedial action.

We review a claim of error in a jury instruction *de novo* and will reverse only if the error was prejudicial in light of the charge as a whole. *See Perry v. Ethan Allen, Inc.*, 115 F.3d. 143, 153 (2d Cir. 1997). A jury instruction is proper so long as the charge correctly and sufficiently covers the case to allow the jury intelligently to decide the questions presented

to it. *See Schermerhorn v. Local 100, Transp. Workers Union of Am.*, 91 F.3d 316, 322 (2d Cir. 1996).

In support of her argument that the jury charge should have contained the word "prompt," Bruneau relies upon our decision in *Ethan Allen* where we expressly approved a jury charge instructing that an employer would be liable if "management level employees failed to implement *prompt* and appropriate corrective action." 115 F.3d at 153 (emphasis added). She also points to comparable case law in other circuits. *See, e.g., Swentek v. USAir, Inc.*, 830 F.2d 552, 558 (4th Cir. 1987) (stating that an employer is liable if it "took no prompt and adequate remedial action"); *Jones v. Flagship Int'l*, 793 F.2d 714, 719-20 (5th Cir. 1986) (including among the elements of a hostile work environment claim whether "the employer knew or should have known of the harassment in question and failed to take prompt remedial action").

That we approved the use of the word "prompt" used in one jury charge however, does not mean the word must be inserted in every jury charge. For example, in *Kracunas v. Iona College*, 119 F.3d 80 (2d Cir. 1997)—which involved a Title IX claim by students against a college for hostile environment sexual harassment—we held a defendant must take "appropriate remedial action" in response to a complaint of sexual harassment to escape liability. *Id.* at 89. Implicit in our understanding of "appropriate" was the notion that the action must be prompt. *See id.* at 90 ("[T]he district court erred in concluding that Iona's response to the harassment—coming four to six months after [its agent] first learned of the allegations—was appropriate as a matter of law."). A remedial action taken following a lengthy and unjustified delay therefore, cannot be deemed "appropriate."

In the present case, the district court instructed the jury to consider the appropriateness of the corrective measures taken. This instruction adequately explained the law because an analysis of the appropriateness of the actions taken would necessarily incorporate the issue of timeliness. Thus, it was

not reversible error for the district court to omit the word "prompt" from its instructions.

C. *Refusal to Sequester Race and Parker*

Bruneau requested that Race and Parker be excluded from the trial pursuant to Fed. R. Evid. 615 so that they could not hear the testimony of other witnesses. Judge Kahn refused to grant this request and permitted the two to remain in the courtroom throughout the trial, notwithstanding the fact that they subsequently testified as witnesses for the School. The district court determined both witnesses were essential to the defendant's case and therefore exempted them from any sequestration order. Bruneau asserts this decision constitutes reversible error.

Rule 615 grants a party the right to request the exclusion of a witness from the courtroom in order to prevent the witness from hearing the testimony of other witnesses. The rule seeks to prevent the "tailoring" of a witness's testimony to that evidence given earlier in the trial and helps to uncover fabrication. *See Geders v. United States*, 425 U.S. 80, 87 (1976). A party's request to exclude a witness during trial must be granted as a matter of right, unless the witness sought to be excluded fits into one of three exempted categories. *See* Fed. R. Evid. 615 advisory committee's note.

One such category of witnesses are those persons "whose presence is shown by a party to be essential to the presentation of the party's cause." Fed. R. Evid. 615. Whether a witness is essential and thus exempt from an order of exclusion is a matter committed to the trial court's discretion. *See United States v. Jackson*, 60 F.3d 128, 134 (2d Cir. 1995); *United States v. Payan*, 992 F.2d 1387, 1394 (5th Cir. 1993). We will reverse that determination only for an abuse of discretion. *See Polythane Sys., Inc. v. Marina Ventures Int'l Ltd.*, 993 F.2d 1201, 1209 (5th Cir. 1993); *Payan*, 992 F.2d at 1394; *United States v. Agnes*, 753 F.2d 293, 306 (3d Cir. 1985).

Six factors serve as guides to inform a district court's exercise of its discretion: (1) how critical is the sought-to-be-excluded witness's testimony; (2) whether that testimony is ordinarily subject to tailoring; (3) whether the testimony is likely to cover the same issues as other witnesses; (4) in what order will the witnesses be called; (5) whether any potential for bias exists that could incline a person to tailor his testimony; and (6) whether the witness's presence is essential or simply desirable. *See Jackson*, 60 F.3d at 135.

Plaintiff has not shown that the district court abused its discretion by exempting Race and Parker from a Rule 615 sequestration order. The court reasoned that Race, as the School's assistant superintendent, was the official most knowledgeable of the School's Title IX policy, and she also knew what actions the School had taken to remedy its alleged violation. The court also found that Parker, as Bruneau's sixth grade teacher, was the only legally responsible school official present in the classroom with the opportunity to observe directly the alleged discriminatory occurrences. We find no error in the conclusion that both witnesses were essential to the presentation of the School's case and therefore needed to be accessible in the courtroom throughout the trial.

Moreover, we believe Race's and Parker's testimony was not subject to tailoring. Their testimony had been previously recorded during extensive examinations before trial. Thus, any alteration at trial of the testimony given in deposition would be subject to challenge on cross-examination. The order in which the witnesses were called was not an important consideration in this case because Race and Parker were present during the pre-trial depositions of plaintiff and other of her witnesses, and therefore had already heard most of the courtroom testimony.

Hence, none of the three challenges raised concerning matters at trial constitute a reversible error warranting a new trial. As a consequence, the judgment based on the jury's verdict for the defendant must be affirmed.

CONCLUSION

Accordingly, for the reasons stated, the order dismissing Bruneau's § 1983 claim in its entirety and the judgment following trial on the Title IX claim are affirmed. The district court dismissed Bruneau's § 1983 claim against the School District and School Board, correctly finding that Title IX subsumes Bruneau's § 1983 claim against these defendants. Because we hold that the district court properly ruled that Parker and Race were entitled to qualified immunity, we need not determine whether Title IX subsumes a § 1983 claim against individual state actors in a school setting.

Order and judgment affirmed.

OAKES, *Senior Circuit Judge:*

I concur in Judge Cardamone's extensive and well-analyzed opinion in its entirety, but write separately to add a few words of explanation.

It is irrefutable that Congress could not, by enacting a statute like Title IX, somehow erode or limit a constitutional right such as the right to equal protection under the Fourteenth Amendment to the United States Constitution. A careful analysis of *Smith v. Robinson*, 486 U.S. 992 (1984), indicates that it does not threaten that position. When *Smith* is analyzed closely, one recognizes that the case held, in part, that "Congress intended to preclude reliance on § 1983 as a remedy for a substantial equal protection claim." *Id.* at 1012. In other words, because § 1983 is a statutory remedy, and Congress retains authority to repeal or replace it, Title IX may have that effect. Here, as in *Smith*, there is no issue of "Congress' ability to preclude the federal courts from granting a remedy for a constitutional deprivation." *Id.* at n.15. This case makes not even the slightest inroad into the well-established jurisprudence to the effect that if Congress were

to repeal all statutory remedies for constitutional violations, the federal courts could still grant whatever relief were necessary to remedy the wrong done in violation of the Constitution. *See id.* (citing *Bell v. Hood*, 327 U.S. 678, 684 (1946); *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 396 (1971); *id.* at 400-406 (Harlan, J., concurring in judgment)).

APPENDIX B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

EVE BRUNEAU, etc.	**JUDGMENT IN A CIVIL CASE**
v.	
SOUTH KORTRIGHT CENTRAL SCHOOL, et al	**CASE NUMBER: 3: 94-CV-864 (LEK)**

☒ Jury verdict. This action came before the Court for a Trial by Jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the defendants' motion for summary judgment, the amended complaint is dismissed in its entirety against defendants Lynda Race and William Parker in accordance with Chief Judge Thomas J. McAvoy's Memorandum-Decision-Order issued on July 24, 1996. The Court further dismissed the 1983 cause of action against defendants South Kortright Central School and South Kortright School board in accordance with its decision.

As to the remaining cause of action, Title IX hostile learning environment/sexual harassment, the jury found NO CAUSE OF ACTION in favor of defendants South Kortright Central School and South Kortright School Board.

November 22, 1996
Date

s/s Clerk
Clerk

s/s Deputy Clerk
(By) Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

EVA BRUNEAU, a Minor,
by and through her Guardian *ad litem*,
Pat Schofield,

Plaintiff,

-v- 94-CV-0864

SOUTH KORTRIGHT CENTRAL
SCHOOL DISTRICT, LYNDA H.
RACE, WILLIAM PARKER,
SOUTH KORTRIGHT SCHOOL BOARD,

Defendants.

Appearances:
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New York, New York 10013
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FRANK W. MILLER

MEMORANDUM, DECISION AND ORDER

I. BACKGROUND AND FACTS

The Plaintiff, Eva Bruneau, was a student in the sixth grade at South Kortright Central School District. Pat Schofield, the Plaintiff's mother, was appointed her guardian *ad litem* for the purposes of this suit by this Court's Order dated December 22, 1994. The Defendants are: South Kortright Central School (hereinafter "SKCS"), a public school which receives Federal financial assistance; Lynda Race, an assistant superintendent of the school; William Parker, the Plaintiff's former sixth grade teacher; and the South Kortright Central School Board.

I. Procedural Background

The Plaintiff's original claim, filed on July 13, 1994, asserted a cause of action against the Defendants for a violation of 20 U.S.C. § 1681 (hereinafter "Title IX"), 42 U.S.C. § 1983 and the Fourteenth Amendment of the United States Constitution. On September 14, 1994, the Defendants filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) or alternatively for summary judgment Pursuant to Fed. R. Civ. P. 56. In an Order dated December 22, 1994, this Court, *inter alia:* (1) granted the Defendants' motion to dismiss the Title IX claims against the individual Defendants Mr. Parker, Mrs. Race and Mr. Thompson; (2) denied the Defendants' motion to dismiss the Title IX claims against SKCS and the SKCS Board of Education; (3) denied the Defendants' motion to dismiss the 42 U.S.C. § 1983 claims; (4) granted the Defendants' motion to dismiss the 42 U.S.C. § 1983 claim against SKCS and the SKCS Board only in regard to school policy and custom but granted the plaintiff 30 days in which to amend her complaint; (5) granted the Defendants' motion to dismiss the 42 U.S.C. § 1983 claims against individual Defendant Mr. Thomson; and (6) denied the Defendants' motion for summary judgment in its entirety.

On December 27, 1994, the Plaintiff filed her Amended Complaint. The Plaintiff asserts that Title IX

supports a claim where supervising authorities, such as faculty members, administrators or school board members, knowingly fail to act to remedy a sexually hostile learning environment created by fellow students. The Plaintiff claims that a Title IX claim should be governed by the same judicial standards applicable to 42 U.S.C. § 2000e-2(a) (hereinafter "Title VII") relating to an employer's toleration of a sexually hostile working environments created by employees.

On June 6, 1996, the Defendants moved for summary judgment against the Plaintiff's Amended Complaint. They contend that Title VII analysis is not applicable to a Title IX claim where the sexually hostile learning environment was created by a student's peers.

ii. The Plaintiff's Case

The Plaintiff alleges that she and other girls in her class were subjected to verbal and physical sexual harassment beginning in September, 1993, until she was forced to transfer from SKCS on March 1, 1994. The Plaintiff claims that such sexual harassment made her feel unsafe and depressed. Bruneau Aff'd at 1-2. Additionally, the harassment created an intimidating, abusive and hostile learning environment which interfered with her education. *Id.* The Plaintiff and other girls were often referred to as "lesbian", "prostitute", "retard", "scum", "bitch", "Whore" and "ugly dog faced bitch." Plaintiff's Counter-Statement of Disputed Material Facts at 2. The physical harassment included the boys; snapping the girls' bras, running their fingers down the girls' backs, stuffing paper down the girls' blouses, cutting the girls' hair, grabbing the girls' breasts, spitting, shoving, hitting and kicking. Bruneau Aff'd. at 1-5.

The Plaintiff alleges that Mr. Parker and Ms. Race were aware of the sexually harassing conduct and failed to take any action to stop it. *Id.* at 5. At a meeting on or about November 16, 1993, the Plaintiff alleges that all the girls in

the class, including herself, informed Mr. Parker of the sexual harassment. *Id.* Additionally, the Plaintiff contends that in meetings on November 3, 1993, November 19, 1993, and March 25, 1994, the Plaintiff and her parents brought the sexually harassing conduct to the attention Mr. Parker, Mrs. Race, and other school officials. Schofield Aff'd. at 3, 5, Bruneau Aff'd. at 9. Ms. Schofield alleges that she specifically informed Mr. Parker that she felt that the boys behavior constituted sexual harassment. *Id.* at 3. Allegedly Mr. Parker responded by telling her that he believed that the boys conduct was normal flirting and teasing and that "Eve was so beautiful that the guys would be all over her in a couple of years." *Id.* at 4. The Plaintiff claims that the boys sexually harassing conduct continued despite many specific reports to school employees. Bruneau Aff'd. at 6.

Additionally, the Plaintiff alleges that Mr. Parker favored his male students by assisting, inviting, and encouraging them to participate in certain projects and activities in the classroom while not inviting or encouraging, even discouraging, the girls participation. *Id.* at 8-9. As examples, the Plaintiff recounts that Mr. Parker assisted only the boys in making Indian headdresses and turkey calls. When the Plaintiff asked if she could participate in the activity she states that Mr. Parker handed her a straw and told her to "suck on this instead." *Id.* Additionally, the Plaintiff asserts that the boys' closet had more storage space than the girls and that Mr. Parker brought in hunting, sports, and gun magazines for the boys but nothing for the girls. *Id.* at 9. Mrs. Schofield informed Mrs. Race on November 19, 1993, that she felt that Mr. Parker's room was male-oriented. Schofield Aff'd. at 7.

iii. The Defendants' Case

The Defendants contend that neither the Plaintiff nor her parents gave the school adequate notice of the alleged sexual harassment. Defendant's Memorandum of Law at 8.

The Defendants do not contest that Mrs. Schofield made two verbal complaints to Mr. Parker concerning alleged peer sexual harassment on or about November 3, 1993, and November 10, 1993. Defendants' Statement of Uncontested Facts at ¶ 12. Yet, each complaint allegedly related to the same incident. That incident involved a male student calling the Plaintiff a "dog faced bitch." *Id.*

Mr. Parker contends that, other than the Plaintiff's complaint filed with this Court, he has "never heard Eve Bruneau, Pat Schofield, or any other student or parent allege that there was sexual harassment occurring in my class room." Parker Aff'd at 11, 15. He did not observe any sexual activity between any children and does not believe that sexual harassment occurred in his classroom. *Id.* at 15-16. Mr. Parker contends that, "[t]here was no situation of which I am aware where I did not address a student's misbehavior when it was brought to my attention." *Id.* at 16. Additionally, during November 16, 1993, meeting neither the Plaintiff nor the other girls in his class informed him that they felt they were being sexually harassed. *Id.* Mr. Parker recounts that the only episodes of mistreatment by the male classmates alleged by the girls included not allowing them to play on the playground, the boys not participating with them in various playground activities, pushing, and shoving. *Id.* Mr. Parker stated that," things such as pushing and shoving, horseplay and the like, are typical sixth grade behavior." *Id.*

The Defendants do not contest that Mrs. Schofield made complaints to Mrs. Race concerning alleged sexual harassment on November, 1993, and March 25, 1994. Plaintiff's Statement of Uncontested Facts ¶ 13. It should be noted that the March 25, 1994, complaint was made only one day prior to the Plaintiff's transfer from SKCS. *Id.* Additionally, Mrs. Race denies receiving any complaint from the Plaintiff concerning any acts of alleged sexual harassment at any time during the 1993-1994 school year until the March

25, 1994, meeting. Race Aff'd. at ¶¶ 17, 20. Mrs. Race claims that her November, 1993, meetings with Mrs. Schofield were primarily concerned with the school district's discontinuance of the accelerated mathematics program. *Id.* at ¶ 21. During the course of that meeting, Mrs. Schofield did bring to Mrs. Race's attention the incident in which the Plaintiff was referred to as an "ugly dog faced bitch" and that the Plaintiff had been excluded from several class projects including the Indian headdress and turkey call project. *Id.* at ¶ 22, 23. Mrs. Race contends Mrs. Schofield asked her to address these problems and Mrs. Race allegedly complied. *Id.* at ¶¶ 22, 24, 26. Mrs. Race claims that nothing further was asked of her. *Id.* Finally, Mrs. Race denied that she ever disregarded or ignored any complaints made by the Plaintiff, her mother or anyone else in regard to alleged sexual harassment. *Id.* at ¶ 16.

The Defendants contend that the Plaintiff at no time made or filed any written complaint alleging that the acts of sexual harassment perpetrated by fellow students were ignored by school district officials, *Id.* at ¶ 11, nor filed a complaint pursuant to SKCS's Title IX policy during the time frame referenced by the Plaintiff's complaint. *Id.* at ¶ 8.

II. DISCUSSION

The Defendants contend that Title VII analysis is not applicable to a Title IX claim where a sexually hostile learning environment was created by a student's peers. In the alternative, the Defendants argue that, even if Title IX did apply, they did not receive adequate notice of the harassment. Finally, in regard to the individual Defendants Mr. Parker and Mrs. Race, the Defendants argue that they are entitled to protection from a 42 U.S.C. § 1983 suit based on qualified immunity. Consequently, the Defendants move pursuant to Fed. R. Civ. P. 56 for summary judgment.

The Plaintiff claims that their Title IX claim should be governed by the same legal standards applicable to Title VII regarding an employer's toleration of a sexually hostile working environment created by employees. In this vein, the Plaintiff asserts that the Defendants' liability for a hostile learning environment is predicated on findings that a *prima facie* hostile environment existed and that the Defendants knowingly failed to act to remedy it. Additionally, the Plaintiff asserts 42 U.S.C. § 1983 claims based on the alleged Title IX violation. Finally, the plaintiff asserts that the Defendants' do not have qualified immunity from 42 U.S.C. § 1983 because the right of a student to be free from a hostile environment created by peer-on-peer sexual harassment is well settled under Title IX.

A. Standard For Summary Judgment

A motion for summary judgment should be granted "if the pleadings... together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The movant bears the initial burden of showing the Court that, on the evidence before it, there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). In determining whether a genuine issue of material fact has been raised, not only must there be no genuine issue as to the evidentiary facts, but there also must be no controversy regarding the inferences to be drawn from them. *Bennett v. New York City Dept. of Corrections*, 705 F. Supp. 979, 982 (S.D.N.Y. 1989).

Once the moving party has satisfied her burden, the nonmovant must then "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). When "considering a motion for summary judgment, the district court may rely on 'any material that would be admissible or usable at trial'." *Azrielli v. Cohen Law Offices*, 21 F.3d 512, 516 (2d Cir. 1994), *quoting* C. Wright & A.

Miller, Federal Practice and Procedure: Civil § 2721 at 40 (2d ed. 1983)). All ambiguities must be weighed in favor of the non-moving party. *Ramseur v. Chase Manhattan Bank*, 865 F.2d 460, 465 (2d Cir. 1989). "Only when reasonable minds could not differ as to the import of the evidence is summary judgment proper." *Bryant v. Maffucci*, 923 F.2d 979, 982 (2d Cir. 1991), *cert. denied*, 502 U.S. 849 (1991).

Where a Title VII Defendant's intent is at issue, summary judgment is generally inappropriate.[2] *Rosen v. Thornburgh*, 928 F.2d 528, 533 (2d Cir. 1991). "The showing the plaintiff must make as to the elements of the *prima facie* case [of discrimination] in order to defeat a motion for summary judgment is *de minimis*." *Dortz v. City of New York*, 904 F. Supp. 127,150 (S.D.N.Y. 1995), *citing Cronin v. Aetna Life Insurance Co.*, 46 F.3d 196, 203-04 (2d Cir. 1995).

> In determining whether the plaintiff has met the *de minimis* initial burden of showing "circumstances giving rise to an inference of discrimination," the function of the court on a summary judgment motion is to determine whether the "proffered admissible evidence shows circumstances that would be sufficient to permit a rational finder of fact to infer a discriminatory motive. It is not the province of the summary judgment court itself to decide what inferences should be drawn. "

Id., *citing Cronin*, 46 F.3d at 204. With these standards in mind, the Court now turns to the issues presented.

B. 20 U.S.C. §1681 *et seq.* (Title IX)

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[2] As will be shown below, Title VII analysis is applicable to Title IX claims.

As with any statute, our starting point in determining the scope of Title IX is the statutory language. *Bailey v. United States,* 116 S. Ct. 501, 504 (1995). Title IX states, in relevant part, that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance..." 20 U.S.C. § 1681(a). The purpose of Title IX is to protect individuals from sex discrimination by denying federal financial aid to those institutions that bear responsibility for sexually discriminatory practices. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 n.36 (1979), *citing* 117 Cong. Rec. 39252 (1971). The Supreme Court has determined that a private right of action is implied under Title IX, and in addition to the availability of injunctive and declaratory relief, monetary damages are also available for intentional violations of Title IX. *Id.*, at 709; *Franklin v. Gwinnett County Public Schools,* 503 U.S. 60, 75, 112 S. Ct. 1028, 1038 (1992),[3] *see also Murray v. New York Univ. College of Dentistry*, 57 F.3rd 243, 248 (2d Cir 1995).

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[3] Like the instant case, the *Franklin* -Court faced allegations of intentional discrimination, and thus, a monetary remedy is available to the Plaintiff herein. The Franklin Court explained that:

> The point of not permitting monetary damages for an unintentional violation is that the receiving entity of federal funds lacks notice that it will be liable for a monetary award. This notice problem does not arise in a case such as this, in which intentional discrimination is alleged... Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe. Moreover, the notion that Spending Clause statutes do not authorize monetary awards for intentional violations is belied by

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1. Application of Title VII Jurisprudence to Title IX Claim

The Defendants assert that Title VII jurisprudence is not applicable to a Title IX claim. Rather, the Defendants claim that there can be no Title IX liability unless the Plaintiff can show that the Defendants responded differently, *ceteris paribus*, to complaints of sexual harassment from male and female students. Alternatively, the Plaintiff argues that Title VII jurisprudence provides the appropriate legal standards for analyzing a Title IX claim. More particularly, the Plaintiff seems to claim that the Court should apply Title VII's legal test for determining if there is a "hostile work environment" to determine if there is a "hostile learning environment," and thus, liability under Title IX. For the following reasons this Court rejects the Defendants' argument, and holds that Title VII legal standards apply to an analysis of Title IX claims.

At the outset, the Court cautions that by holding that Title VII legal standards apply to an analysis of Title IX claims, the Court is *not* holding that the entirety of Title VII jurisprudence must be applied to Title IX. Rather, a Court must determine the appropriate segments and the proper extent to which the law of Title VII applies to a given Title IX analysis. Title VII jurisprudence is a guide, and a Court should not blindly apply Title VII to determine the issues raised in a Title IX case.

A considerable body of case law instructs that when analyzing a Title IX claim courts should apply Title VII jurisprudence. *Franklin*, 503 U.S. at 73-76 ("the same rule [as when a supervisor sexually harasses a subordinate under Title VII] should apply when a teacher sexually harasses and

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> our unanimous holding in [*Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 628 (1984)].

Franklin, 112 S. Ct. at 1037 (citations omitted).

abuses a student."); *Murray*, 57 F.3d at 249 ("In reviewing claims of discrimination brought under Title IX by employees, whether for sexual harassment or retaliation, courts have generally adopted the same legal standards that are applied to such claims under Title VII."); *Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186, 1190 (11th Cir. 1996) (Title VII standards governing hostile working environment applicable to Title IX claim against school for knowingly failing to act to remedy hostile school environment); *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 832 (10th Cir. 1993) (Title VII provides "the most appropriate analogue when defining Title XI's substantive standards."); *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988) (Title VII standard for proving discriminatory treatment applies to claims arising under equal protection clause and Title IX); *see also*, *Yusuf v. Vassar College*, 35 F.3d 709, 714 (2d Cir. 1994) (In the case of gender discrimination occurring in college disciplinary proceedings, courts should interpret Title IX by looking to the body of taw developed under Title VI, as well as the case law interpreting Title VII).

The Second Circuit has determined that "[t]he [Supreme] Court's citation of *Meritor Savings Bank, F.S.B. v. Vinson,*[4] 477 U.S. 57 (1986), a Title VII case, in support of *Franklin*'s[5] central holding indicates that, in a Title IX suit for gender discrimination based on sexual harassment of a student, an educational institution may be held liable under standards *similar* to those applied under Title VII."[6] *Murray*

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4 *Meritor* involved allegations of supervisor/supervise sexual harassment under Title VII.

5 *Franklin* involved allegations of teacher/student sexual harassment under Title IX.

6 Title VII states, in relevant part, that:
It shall be an unlawful employment practice for an employer-

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57 F.3d at 249 (emphasis added). In addition, the Tenth-Circuit has stated "[b]ecause Title VII prohibits the identical conduct prohibited by Title IX, i.e., sex discrimination, we regard it as the most appropriate analogue when defining Title IX's substantive standards..."[7] *Mabry v. State Bd. of*

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(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a).

Accordingly, conduct which is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment", *Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367, 370 (1993), coupled with "a specific basis for imputing the conduct that created the hostile environment to the employer," is actionable under Title VII. *Murray,* 57 F.3d at 249. "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment–an environment that a reasonable person would find hostile or abusive–is beyond Title VII's purview." *Harris* 114 S. Ct. at 370. "Whether the harassing conduct of a supervisor or coworker should be imputed to the employer is determined in accordance with common-law principles of agency." *Murray*, 57 F.3d at 249.

[7] The Tenth-Circuit went on to state that this included "the question of whether 'disparate impact' is sufficient to

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Community Colleges & Occupational Educ., 813 F.2d 311, 316 n.6 (10th Cir. 87), *cert. denied,* 484 U.S. 849 (1987). Thus, to the extent that Title IX prohibits the same conduct prohibited by Title VII, this Court may apply the legal standards from Title VII to guide its analysis of the instant Title IX claim.[8]

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establish discrimination under Title IX. It is well settled that Title VII does not require proof of explicit or overt discrimination." *Mabry*, 813 F.2d at 316, *citing Dothhard v. Rawlinson*, 433 U.S. 321 (1977); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

[8] The Defendants rely on the Fifth Circuit's opinion in *Rowinsky v. Bryan Indep, Sch. Dist.*, 80 F.3d 1006 (5th Cir. 1996). *Rowinsky* did not discuss when or if Title VII jurisprudence was applicable to Title IX analysis. Discussion of Title VII was limited to the context of discussing agency principles between employer and employee. The central holding in *Rowinsky* was that a school district can not be held liable, under Title IX, for a hostile environment created by peer sexual harassment absent allegations that the school district itself intentionally discriminated on the basis of sex. Id. at 1016. In essence, *Rowinsky* applied an equal protection, disparate treatment analysis. Id. at 1016 ("a school district might violate Title IX if it treated sexual harassment of girls, or even if it turned a blind eye toward sexual harassment of girls while addressing assaults that harmed boys."). In addition, the *Rowinsky* Court found that liability under Title IX could attach only to recipients of Federal funds or their agents. Id. at 1013. When the hostile environment is created by students, liability can not attach because students are not agents of the school. Id. at 1011 n.11.

This Court is not bound by the Fifth Circuit's decision in *Rowinsky*. Although this Court finds the application of

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2. Peer-on-Peer Sexual Harassment

Although the Second Circuit has applied Title VII jurisprudence to an analysis of a Title IX claim for sexual harassment between a teacher and a student, *Murray*, 57 F.3d at 249, *citing*, *Meritor*, 477 U.S. at 64, it has not directly addressed the issue of whether Title VII analysis is appropriate, *in toto*, where a Plaintiff seeks to impose liability, under Title IX, on an educational institution for a hostile learning environment created by peer-on-peer sexual harassment.[9]

As pointed out by the Plaintiff, Title VII principles impose liability on employers for knowingly failing to act to remedy a hostile working environment created by sexual harassment between co-workers. The Plaintiff's Brief in Response to Defendants' Motion for Summary Judgment at 10-13, citing *Franklin*, 112 S. Ct. 1028; *Davis*, 74 F.3d 1186; *Murray*, 57 F.3d 243; *Brown v. Hot Sexy and Safer Productions, Inc.*, 68 F.3d 1186 (11th Cir. 1996); *Patricia H. V. Berkeley Unified Sch. Dist.*, 830 F. Supp. 1288 (N.D. Cal. 1993); *Bosley v. Kerney R-I Sch. Dist.*, 904 F. Supp. 1006

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agency principles appropriate to a Title IX claim for a hostile learning environment created by peer-on-peer sexual harassment, as will be explained herein, this Court builds upon the *Rowinsky* decision and finds that Title VII jurisprudence provides an appropriate guide to analyzing Title IX claims.

[9] There is no consensus among the Circuit Courts as to the precise legal standard to be applied to determine institutional liability under Title VII analysis, for a Title IX violation. *See Doe v. Petaluma*, 830 F. Supp. 1560, 1563 (N.D. Cal. 1993), *rev'd on other grounds*, 54 F.3d 1447 (9th Cir. 1995); *cf.*, *Harris v. Monroe County Bd. of Educ.*, 74 F.3d 1186, 1193-1194 (11th Cir. 1996).

(W.D. Mo. 1995)). The Plaintiff argues that because Title VII jurisprudence has been held to apply to analyses of Title IX claims generally, educational institutions should also be liable, just as employers under Title VII, for knowingly failing to act to remedy a hostile learning environment created by peer-on-peer sexual harassment. *Id.* The Plaintiff further argues that institutional liability for peer-on-peer sexual harassment is based on agency principles and agency principles support a finding that constructive notice of peer-on-peer sexual harassment is sufficient to establish institutional liability. *Id.* At 14-17 (The Plaintiff relies on Title VII cases to support this proposition arguing that "[n]o rationale justifies distinguishing schools from the workplace in assessing institutional liability.").

The Defendants argue that the peer-on-peer situation in a classroom is very different from the employee/employee or employer/employee situation in the workplace. The Defendants' Brief Reply at 1-3. Title VII proscribes actions by adults, rather than children, and arises in an agency relationship. *Id.* Both of the aforementioned characteristics of a Title VII claim, according to the Defendants, are absent in the school setting. This is particularly true in the context of a hostile learning environment created by peer-on-peer sexual harassment. Accordingly, the Defendants urge the Court, at a minimum, to apply some modified version off Title VII.

Title VII requires employers to take steps to assure their employees a work environment free from sexual harassment, regardless of whether the harassment or hostile environment is caused by a supervisor or other co-workers. *Karibian v. Columbia Univ.*, 14 F.3d 773, 780 (2d Cir. 1994) *cert. denied,* 114 S. Ct. 2693 (1994); *see also Davis,* 74 F.3d at 1193-1194 (Title IX requires an educational institution to take action to remedy a hostile environment created by peer-on-peer sexual harassment). When an employer fails to act to remedy a hostile environment created by co-workers the

employer discriminates against an individual in violation of Title VII. *Id.* Similarly, the Court finds that in the Title IX context, when an educational institution fails to take steps to remedy peer-on-peer sexual harassment, it should be held liable to the harassed student for that discriminatory conduct.

> Just as a working woman should not be required to "run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living," *Meritor*, 477 U.S. at 67, a female student should not be required to run a gauntlet of sexual abuse in return for the privilege of being allowed to obtain an education.

Davis, 74 F.3d at 1194.

"A student should have the same protection in school that an employee has in the workplace." *Davis*, 74 F.3d at 1192-1193, *citing*, *Franklin*, 112 S. Ct. at 1037. Moreover, "as economically difficult as it may be for adults to leave a hostile workplace, it is virtually impossible for children to leave their assigned school." *Davis*, 74 F.3d at 1193. "A sexually abusive environment inhibits, if not prevents, the harassed student from developing her full intellectual potential and receiving the most from the academic program." *Id.*, *citing Patricia H. v. Berkeley Unified Sch. Dist.*, 830 F. Supp. 1288, 1293 (N.D. Cal. 1993).

Yet, "importing a theory of discrimination from the adult employment context into a situation involving children is highly problematic." *Rowinsky*, 80 F.3d at 1011. "At a theoretical level, the problem with sexual harassment is 'the unwanted imposition of sexual requirements in the context of unequal power.'" *Id. citing* Catherine MacKinnon, SEXUAL HARASSMENT OF WORKING WOMEN. 1 (1979). In the context of unwanted peer-on-peer sexual harassment such a power relationship does not exist. "Unwanted sexual advances of fellow students do not carry the same coercive effect or abuse

of power as those made by a teacher, employer or co-worker." *Rowinsky,* 80 F.3d at 1011.

Therefore, the issue remains under what parameters a Court may find an educational institution to be liable for failing to act to remedy a hostile learning environment created by peer-on-peer sexual harassment. In other words, to what extent must the institution (and the school board in this case) be on notice of the alleged ongoing harassing conduct, *i.e.*, must notice be actual, or may notice be constructive, for Title IX liability to attach.

3. Notice

Title VII jurisprudence applies an actual and constructive notice standard for determining if an employer knowingly failed to act to remedy a hostile working environment created by peer-on-peer harassment. *See Karen Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708, 715 (2d Cir. 1996); *Equal Employment Opportunity Commission v. A. Sam & Sons Produce Co.*, Inc., 872 F. Supp. 29, 34 (W.D.N.Y. 1994).[10]

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[10] Title VI, after which Title IX is modeled, *see Cannon v. Univ. of Chicago*, 441 U.S. 677, 695-696 (1979), also applies a actual and/or constructive notice requirement for knowingly failing to remedy a racially hostile environment. *Yusuf*, 35 F.2d at 714. The reasons why constructive notice is applied to Title VI was explained by the Supreme Court in *Alexander v. Choate,* 469 U.S. 287, 292-294 (1985), and *Guardians Ass. v. Civil Service Commission,* 463 U.S. 582 (1983). In Guardians, the Court confronted the question whether Title VI reached both intentional and disparate impact discrimination. No opinion commanded a majority in *Guardians*, and Members of the Court offered widely varying interpretations of Title VI. Nonetheless, the Court in

Continued on next page

Constructive notice is a substitute for actual notice and will be found to exist "where a defective condition has existed for such a length of time that knowledge thereof should have been acquired in the exercise of reasonable care." *Fiorella v. Caleminis*, 1996 W.L. 288471 *3 (E.D.N.Y.). This is, in essence, a negligence standard. *See Doe*, 830 F. Supp. at 1576. For the reasons stated below, this Court finds that to establish a Title IX claim for a hostile learning environment created by peer-on-peer sexual harassment the Plaintiff must show that the school and/or school board received *actual* notice of the sexual harassing conduct and failed to take action to remedy it. Liability will not lie if the Plaintiff can show only constructive notice.

As stated above, Title IX analysis is guided by Title VI and Title VII jurisprudence "only to the extent that the language and history of Title IX do not suggest a contrary interpretation." *Mabry*, 813 F.2d 311. The reasoning for applying constructive notice to Title VII claims arises out of agency principles. *See Meritor*, 106 S. Ct. at 2407-2408. In *Meritor*, the Supreme Court stated that they "agree with the

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Alexander explained that *Guardians* expounded a two-pronged holding concerning the nature of the discrimination proscribed by Title VI. First, the Court held that Title VI itself directly reached only instances of intentional discrimination. Second, the Court held that actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI. *Alexander*, 469 U.S. at 293-294. Thus, the reasons why constructive notice has been applied to Title VI cases was due to the administrative regulations accompanying Title VI.

EEOC[11] that Congress wanted courts to look to agency principles for guidance in [the Title VII] area." *Id.* at 2408. Therefore, liability for a hostile work environment created by a co-worker may be imputed to an employer even though the employer possesses no direct knowledge of the hostile environment because the co-worker is an agent of the employer.

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[11] The EEOC, in its *amicus* brief, stated that "courts formulating employer liability rules should draw from traditional agency principles." *Meritor*, 106 S. Ct. at 2407, *citing* Brief for United States and EEOC as *Amicus Curiae* 22. Additionally, the Court found that the EEOC believed that agency principles lead to:

> a rule that asks whether a victim of sexual harassment had reasonably available an avenue of complaint regarding such harassment, and, if available and utilized, whether that procedure was reasonably responsive to the employees complaint. If the employer has an expressed policy against sexual harassment and has implemented a procedure specifically designed to resolve sexual harassment claims, and if the victim does not take advantage of that procedure, the employer should be shielded from liability absent actual knowledge of the sexually hostile environment... In all other cases, the employer will be liable if it has actual knowledge of the harassment or if, considering all the facts of the case, the victim in question had no reasonably available avenue for making his or her complaint known to appropriate management officials.

Id.

Although an employee is an agent of an employer, a student, of an educational institution is not, *per se*, an agent of that institution.

> (1) Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act. (2) The one for whom action is to be taken is the principal. (3) The one who is to act is the agent.

Restatement (Second) of Agency § 1 (1957).

"Agency is a legal concept which depends upon the existence of required factual elements: the manifestation by the principal that the agent shall act for him, the agent's acceptance of the undertaking and the understanding of the parties that the principal is to be in control of the undertaking." Restatement (Second) of Agency § 1 cmt. d (1957). Students, *per se*, are not agents of the schools which they attend. In order for agency principles to attach between a student and their school there must be some manifestation of consent by the student to the school that the student shall act on the school's behalf and subject to the school's control, as well as, consent from the school to the student's actions. The Plaintiff has not alleged, nor provided any evidence, that the harassing students were acting on behalf of or with authority from SKCS. Therefore, although constructive notice principles properly attach between employer and employee in the Title VII context, they do not attach between the alleged harassing student and the Defendants' in this Title IX case. *See Rowinsky,* 80 F.3d at 1011, n.11.

4. Title VII's Criteria Applied to Hostile Learning Environment

It is now well established that two forms of sexual harassment violate Title VII's prohibitions against workplace

inequality: 1) *quid pro quo* and 2) hostile work environment harassment. *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1304-05 (2d Cir. 1995); *see Meritor*, 477 U.S. at 73 (recognizing that a claim of hostile environment sex discrimination is actionable under Title VII"). It is the "hostile environment" category that is implicated in this case.

Under Title VII, in order to survive a motion for summary judgment the Plaintiff must establish a establish a *prima facie* case of sexual harassment[12] resulting in the creation of a hostile work environment. In this vein, a Title VII Plaintiff must demonstrate that:

> (1) she belongs to a protected group; (2) she was the subject of unwelcome sexual harassment; (3) the harassment was based on her sex; (4) the sexual harassment affected a term, condition or privilege of employment; and (5) the employer knew or should have known of the harassment and failed to take remedial action.

Fair v. Guiding Eyes for the Blind, Inc., 742 F. Supp. 151, 155 (S.D.N.Y. 1990), *citing*, *Meritor*, 477 U.S. at 63-69. Similarly, a Title IX Plaintiff must demonstrate that:

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[12] Sexual harassment involves "[u]nwelcome sexual advances for sexual favors, and other verbal or physical conduct of a sexual nature." 29 C.F.R. § 1604.11(a), *see also Meritor*, 106 S. Ct. at 2404 ("the Guidelines provide that such sexual misconduct constitutes prohibited 'sexual harassment,' whether or not it is directly linked to the grant or denial of an economic *quid pro quo*, where 'such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.'"), *citing* 29 C.F.R. § 1604.11(a)(3).

> (1) she is a member of a protected group; (2) she was subject to unwelcome sexual harassment; (3) the harassment was based on sex; (4) the harassment was sufficiently severe or pervasive so as to alter the conditions of her education and create an abusive educational environment; and (5) some basis for institutional liability has been established.

Davis, 74 F.3d at 1194.

This test requires "an objectively hostile or abusive environment-one that a reasonable person would find hostile or abusive-as well as the victim's subjective perception that the environment is abusive". *Harris*, 114 S. Ct. at 368. With the foregoing legal standards and the above cited five-part test in mind, the Court now considers the Plaintiff's Title IX claim.

I. Protected Group

There is no dispute that the Plaintiff, as a female, is a member of a protected group. *See Craig v. Boren,* 429 U.S. 190 (1976), *Bridges v. Eastman Kodak Co.*, 822 F. Supp. 1020, 1027 (S.D.N.Y. 1993). Thus, the Plaintiff satisfies the first prong of the test.

ii. Unwanted Sexual Harassment

It is not disputed that the alleged sexual harassment, which the Plaintiff was subjected to, was unwanted. Yet, this does not end our inquiry. To establish unwelcome sexual harassment a Plaintiff must demonstrate that "the conduct complained of would have interfered with a reasonable person's [learning] performance and would have seriously

affected a reasonable person's emotional well-being." *Fair*, 742 F. Supp. at 155.[13]

> [A] hostile environment in an educational setting is not created by simple childish behavior or by an offensive utterance, comment, or vulgarity. Rather, Title IX is violated 'when the [educational environment] is permeated with "discriminatory intimidation, ridicule, and insult "that is a" sufficiently severe or pervasive to alter the conditions of the victim's [environment] and create an abusive environment."

Davis, 74 F.3d at 1194, *citing Harris*, 114 S. Ct. at 370, *quoting Meritor*, 477 U. S. at 64-65.[14]

The conduct alleged by the Plaintiff to constitute sexual harassment includes: verbal epithets such as: "lesbian", "prostitute", "retard", "scum", "bitch", "whore" and "ugly dog faced bitch", and physical harassment including: snapping the girls' bras, running their fingers down the girls' backs, stuffing paper down the girls' blouses, cutting the girls'

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[13] The Supreme Court has stated that "Title VII bars conduct that would seriously affect a reasonable person's psychological well-being, but the statute is not limited to such conduct. So long as the environment would reasonably be perceived and is perceived as hostile or abusive. *Harris*, 114 S. Ct. at 371.

[14] Davis brought a Title IX and 42 U.S.C. § 1983 claim action on behalf of a fifth-grade student against, *inter alia*, the Monroe County School Board concerning the alleged sexual harassment of the student by a fellow classmate which the school knew about but failed to remedy. *Davis*, 74 F.3d at 1188. The allegedly sexually harassing conduct included attempted fondling, actual fondling and offensive and sexually suggestive language.

hair, grabbing the girls' breasts, spitting, shoving, hitting and kicking. Such conduct must be found objectively and subjectively to constitute more than "simple horseplay, childish vulgarities or adolescent flirting" to be categorized as sexual harassment *See Davis*, 74 F.3d at 1195, *Harris* 114 S. Ct. at 368.

Although the conduct set forth above, if proven to have occurred, is clearly offensive, the pivotal issue for the fact-finder is whether such conduct constitutes sexual harassment. This Court can not conclude, as a matter of law, that the conduct alleged by the Plaintiff to constitute sexual harassment is or is not sufficient to constitute sexual harassment. That is a question for a jury to decide.

iii. Harassment Based on Plaintiff's Sex

To establish that the harassment was based on the Plaintiff's sex, the Plaintiff must prove that "but for the fact of her sex, the plaintiff would not have been the object of harassment." *Id. see also Sha v. New York State Dept. of Civil Service*, 1996 WL 19021 *5 (S.D.N.Y.), *citing Martin v. Citibank, N.A.*, 762 F.2d 212, 216 (2d Cir. 1985) ("The essence of a Title VII plaintiff's case must be differential treatment of similarly situated employees."). Profane language may or may not lead to the inference that such language was directed at the Plaintiff because of her sex. *See Equal Employment Opportunity Comm'n v. A. Sam & Sons Produce Co.*, 872 F. Supp. 29, 35-36 (W.D.N.Y. 1994) ("the term, 'whore is usually gender-specific and is certainly more offensive when directed at a woman. Thus the inference is sufficiently strong that [the harassing employee's] conduct was directed at [the Plaintiff] because she was a woman."); *cf.*, *Faire*, 742 F. Supp. at 156 (there is no evidence to suggest that the word "bitch" would be more offensive to one sex than to another). Similarly, the fact that certain allegedly unwanted conduct was physical rather than verbal does not lead to the conclusion that, as a matter of law, such conduct

was gender based. The simple fact that a male student harassed a female student in a gender related manner, *per se*, does not necessarily lead to the conclusion that the alleged harassment was because of the Plaintiff's sex. *Id.*

This proposition is further supported by the fact that the students alleged to have done the harassing were only in sixth-grade. *See* Monica L. Sherer, NO LONGER JUST CHILD'S PLAY: SCHOOL LIABILITY UNDER TITLE IX FOR PEER SEXUAL HARASSMENT. 141 U. Pa. L. Rev. 2119, 2129 May 1993. ("That a student's behavior be fairly recognized as flirting or teasing rather than sexual harassment is a legitimate concern because such a mischaracterization may discourage healthy social/personal relationships."). It is possible that children of such tender years are not even sufficiently aware that their conduct is sexual in nature, much less committed because of the harassee's sex.

The Court reiterates its general reluctance to grant summary judgment where a reasonable finder of fact might infer a discriminatory motive. *Rosen*, 928 F.2d at 533. Thus, after drawing all ambiguities and inferences in favor of the Plaintiff, this Court finds that a reasonable jury might conclude that but for the Plaintiff's sex she would not have been harassed.

iv. Effected a Term, Condition or Privilege of Education

The determination of what constitutes a hostile learning environment "is not, and by its nature cannot be, a mathematically precise test." *Meritor*, 114 S. Ct. at 371. To show that conduct meets the threshold of "affecting a term, condition or privilege" of education, a Plaintiff must demonstrate more than mere isolated incidents. *Snell v. Suffolk County*, 782 F.2d 1094, 1033 (2d Cir. 1986). "[C]asual comments or accidental or sporadic conversation will not trigger equitable relief pursuant to the statute." *Id.*

Yet, the Court stresses that "[it] is not how long the sexual innuendoes, slurs, verbal assaults, or obnoxious course of conduct lasts." *Dortz*, 904 F. Supp. at 149, *citing Carrero v. New York City Housing Auth.*, 890 F.2d 569, 578 (2d Cir. 1989). Rather, "in analyzing 'the totality of the circumstances,' the pervasiveness of such actions is also to be determined by reference to '[t]he offensiveness of the individual actions complained of.'" *Zveiter v. Brazilian Nat'l Superintendency of Merchant Marine*, 833 F. Supp. 1089, 1095 (S.D.N.Y. 1993), *quoting Carrero*, 890 F.2d at 578 (upholding trial court's determination that conduct over two-week period constituted sexual harassment sufficient to establish hostile working environment in violation of Title VII).

The Plaintiff asserts that the alleged hostile environment interfered with her education. Bruneau Aff'd. at 1-2. The Plaintiff states that, "[u]p until this year [the 1993-94 school year], I loved school, was an excellent student and enjoyed learning." *Id.*, at 9. Additionally, she asserts that the harassing conduct made her feel unsafe and caused her to be depressed. *Id.* at 2. She states that the alleged sexual harassment was pervasive and regular. *Id.* The Plaintiff alleges numerous incidents of alleged sexual harassing conduct occurring on a daily basis throughout the 1993-94 school year. *Id.* at 2-8. The Plaintiff's assertions are further supported by the fact that the Plaintiff transferred out of the school in March, 1994. *Id.* at 2.

The Defendants assert that the alleged sexual harassment, if it occurred at all, was not pervasive or regular enough to create a hostile learning environment. Defendants' Memorandum of Law at 8. The Defendants claim that in those instances where the school was notified, by the Plaintiff or her parents, that the Plaintiff was mistreated the offending parties were punished accordingly. *Id.* at 9-1; *see also* Race Aff'd at ¶¶ 16-30 (offending students were removed from the

classroom and reprimanded); Parker Aff'd at Exhibit A (offending students were referred to the principal).

Essentially, both sides have alleged facts which, if proven, would support a reasonable inference by the fact-finder in that party's favor. Therefore, based on the above facts and circumstances of this case, the Court can not hold, as a matter of law, that no reasonable jury would find that the conduct complained of, if proven, affected the terms, conditions or privileges of the Plaintiff's education.

v. Institutional Liability

The Second Circuit, using *Meritor*'s general guidance, has derived the following rules of employer liability under Title VII:

> if a plaintiff's supervisor is the alleged harasser, an employer will be liable if the supervisor uses his actual or apparent authority to further the harassment, or if the supervisor was otherwise aided in accomplishing the harassment by the existence of the agency relationship. By contrast, where a low-level supervisor does not rely on his supervisory authority to carry out the harassment, or a co-employee of the plaintiff is the alleged harasser, an employer will generally not be liable unless 'the employer either provided no reasonable avenue of complaint or knew of the harassment but did nothing about it.

Tomka 66 F.3d 1295, 1305 (2d Cir. 1995) (District Court's grant of summary judgment reversed because sufficient evidence of hostile environment created by co-workers existed to raise questions of material fact). As the Court found earlier, the liability of the school and the school board for any alleged sexual harassment inflicted by one student on another hinges on the type of notice attributable to the Defendant school and school board. In the context of Title

IX, this Court, for the reasons set forth above, has held that such notice must be actual notice of the sexually harassing conduct. *See supra* § B(3).

Under the standard set forth by the Second Circuit, an employer will not be held liable for alleged sexual harassment by a fellow employee, under Title VII, unless "the employer either provided no reasonable avenue of complaint or knew of the harassment but did nothing about it." *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1305 (2d. Cir. 1995). Similarly, an educational institution will not be held liable for alleged peer-on-peer sexual harassment unless the school provided no reasonable avenue of complaint or knew of the harassment but did nothing about it.

It is not disputed that SKCS did provide a reasonable avenue for complaint. The school district has an established Title IX policy in effect during the time period relevant to this case. Moreover, given that certain complaints relating to peer conduct against the Plaintiff were expressed to Mr. Parker and Mrs. Race, it is clear that avenues to express and redress behavior problems among students were available. It is because of these complaints that the Plaintiff alleges that SKCS faculty and administrators, Mr. Parker and Mrs. Race in particular, had knowledge of the alleged peer-on-peer sexual harassment yet failed to act to remedy it

As to the issue of actual notice, the Plaintiff alleges that the Defendants were aware of the hostile environment yet failed to act to remedy it. Such awareness, or actual notice, allegedly came from meetings with the Plaintiff and/or her mother where they repeatedly notified Mr. Parker and Mrs. Race of the sexual harassment that was occurring in their classroom and school. Plaintiff's Brief in Response to the Defendants' Motion for Summary Judgment at 5.

It is undisputed by the parties that the Plaintiff and/or Mrs. Schofield made verbal complaints to Mr. Parker and/or

Mrs. Race concerning alleged peer sexual harassment on or about November 3, 1993, and November 10, 1993. Defendants' Statement of Uncontested Facts at ¶ 2. Yet, the Defendants state that they were not notified of pervasive and regular sexual harassment sufficient to constitute a hostile learning environment. It is the Defendants' position that each complaint related to a single incident where a fellow student referred to the Plaintiff as a "dog faced bitch." *Id.* Additionally, Mr. Parker, the Plaintiff's classroom teacher, contends that, other that the Plaintiff's complaint brought at the outset of this suit, he has "never heard Eve Bruneau, Pat Schofield, or any other student or parent allege that there was sexual harassment occurring in my classroom." Parker Aff'd at 11, 15. He did not observe any sexual activity between any children and does not believe that any sexual harassment occurred in his classroom. *Id.*

Based on the foregoing, and particularly in light of the Court's recognition that it must not decide issues but merely identify those issues that are in dispute, the Court can not find, as a matter of law, that the school and/or the school board were not on actual notice of ongoing peer-on-peer sexual harassment. The Court finds that after consideration off the relevant legal standards and considerable submissions of the parties, there are material factual issues as to: (1) whether the complained of conduct was sexual harassment; (2) whether such harassment was based on the Plaintiff's sex; (3) whether such harassment, if proven, affected the terms, conditions or privileges of the Plaintiff's education; and (4) whether there is a basis for institutional liability, *i.e.*, whether the school and/or school board were on actual notice of the offending conduct. Accordingly, the Defendants' motion for summary judgment, as to the Title IX claim is denied.

D. 42 U.S.C. § 1983 Claims

42 U.S.C. § 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the depravation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

To state a valid civil rights claim under 42 U.S.C. § 1983, a Plaintiff must allege facts showing that a person acting under color of state law deprived the Plaintiff of a right, privilege, or immunity secured by the United States Constitution or the laws of the United States. *West v. Atkins*, 487 U.S. 42 (1988); *Costello v. Fairfield*, 811 F.2d 782 (2d Cit. 1987). The Court notes that federal courts may not apply a "heightened pleading standard" to civil rights claims under 42 U.S.C. § 1983. L*eatherman v. Torrent County Narcotics Intelligence & Coordination Unit,* 113 S. Ct. 1160 (1993).

The Plaintiff has alleged that the Defendants denied her the right to be free from a hostile environment created by peer-on-peer sexual harassment as guaranteed by Title IX. The Defendants argue that Title IX can not support a 42 U.S.C. § 1983 claim. Defendants' Memorandum of Law at 18-19, *citing Pfeiffer v. Sch. Bd. Of Marion Center Sch. Dist.*, 917 F.2d 779,789 (3d Cit. 1990); *Middlesex County Sewerage Auth. v. National Sea Clammers Assn.*, 453 U.S. 1, 20 (1981) ('When a State Official is alleged to have violated a Federal statute which provides its own comprehensive enforcement scheme, the requirements of that enforcement procedure may not be bypassed by bringing suit directly under Section 1983.") The Defendants argue that Congress has included in Title IX a comprehensive enforcement scheme, and that such a scheme evinces Congress' intent to preclude a 42 U.S. C.§ 1983 remedy for Title IX violations. Therefore, the

Defendants seek the dismissal of the Plaintiff's 42 U.S.C. § 1983 claim.

The Defendants' argument has not been addressed directly by the Second Circuit in regard to Title IX. However, the Defendants' position has been adopted by one District Court within the Second Circuit. *Mennone v. Gordon*, 889 F. Supp. 53, 59 (D. Conn. 1995). The *Mennone* Court found that the statutorily prescribed administrative remedies, as well as the availability of a private right of action with a variety of remedies such as injunctive and declaratory relief and monetary damages for intentional violations, "provided significant evidence of congressional intent to supplant [a] § 1983 remedy." Mennone 889 F. Supp. at 59, *citing Wright v. City of Roanoke Development and Housing Auth.* 479 U.S. 418, 427 (1987); *also citing Cannon* 441 U.S. 677 (private right of action); *Franklin*, 503 U.S. 60 (monetary damages for intentional violations); 34 C.F.R. §§ 100.7-100.8,101.23 (administrative remedy which is initiated by filing a complaint with the Department of Education, government has authority to investigate alleged violations and impose sanctions including the denial of federal funding). Accordingly, the *Mennone* dismissed the Plaintiff's 42 U.S.C. § 1983 claim predicated on a violation of Title IX

The Second Circuit has adopted *Wright's* holding that a private right of action is significant evidence of congressional intent to supplant a 42 U.S.C. § 1983 remedy. *See Marshall v. Switzer* 10 F.3d 925, 927 (2d Cir. 1993) (denying Defendant's dismissal motion in regards to the Plaintiff's 42 U.S.C. § 1983 claim because Title I does not provide a private right of action), *cf.*, *Uniformed Firefighters Ass'n v. City New York*, 676 F.2d 20, 22 (1982) (granting Defendant's motion to dismiss the Plaintiff's 42 U.S.C. § 1983 claim because the Comprehensive Employment and Training Act's remedy providing a private right of action indicated congressional intent to preclude a 42 U.S.C. § 1983 remedy).

The Supreme Court has found that, although not express in the statute, Title IX does permit a private right of action. *See Cannon* 441 U.S. 677. Moreover, as stated above, the full panoply of remedies is available to a Title IX Plaintiff, including monetary damages. *Franklin* 503 U.S. 60. Accordingly, the Court finds that Congress intended to supplant 42 U.S.C. § 1983 claims based on sexual harassment in federally funded institutions by its enactment of Title IX. *See Sea Clammers,* 453 U.S. 1. The Plaintiff can not state a 42 U.S.C. § 1983 claim based on a Title IX right against the Defendants. Accordingly, the Court grants the Defendants' motion for summary judgment and dismisses the Plaintiff's 42 U.S.C. § 1983 claims against the Defendants.

E. Qualified Immunity

Although the Court need not determine the issue of qualified immunity, it nevertheless will consider the issue at this time. For the following reasons, had the Plaintiff's 42 U.S.C. § 1983 claim been sustained, the individual Defendants, Mr. Parker and Mrs. Race would have been immune from suit, on grounds of qualified immunity, because it was not sufficiently well settled that peer-on-peer harassment in a school setting violated Title IX.

A Defendant has qualified immunity from a 42 U.S.C. § 1983 suit when:

> [1] it was not clear at the time of the official acts that the interest asserted by the plaintiff was protected by a federal statute or the Constitution. Second, even if the interest asserted by the plaintiff was clearly of a type generally protected by federal law; [2] it was not clear at the time of the acts at issue that an exception did not permit those acts; [or 3] if it was objectively reasonable for him to believe that his acts did not violate those rights.

Robinson v. Via, 821 F.2d 913, 920-921 (2d Cir. 1987).

"The right the government official is alleged to have violated is 'clearly established,' and hence beyond any qualified immunity, when the 'contours' of the right are sufficiently unambiguous so that a reasonable official knows that what he is doing violates that right." *Molinelli v. Tucker*, 901 F.2d 13, 15 (2d Cir. 1990), *citing Anderson V. Creighton*, 483 U.S. 635, 640 (1987). "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Anderson*, 483 U.S. at 640 (citations omitted).

> A finding of apparent unlawfulness does not require that an earlier decision of this court be directly on point with the current facts; however, the absence of such a decision militates against that finding when, in addition, there have been no cases in this Circuit "foreshadowing]" a ruling on the issue, nor many cases in other circuits taking a certain stand.

Molinelli, 901 F.2d at 15, *citing Shabazz v. Coughlin*, 852 F.2d 697, 701 (2d Cir. 1988).

The right to be free from a sexually hostile learning environment created by peer-on-peer sexual harassment was not clearly established under Title IX. The 'contours' of such a right were sufficiently ambiguous so that, even if it is found that the Defendants violated this right, it was reasonable for the Defendants not to be aware that what they were doing violated that right.

III. CONCLUSION

For the reasons stated herein, this Court DENIES the Defendants' motion for summary judgment as to the Plaintiff's

Title IX claims, and GRANTS the Defendants' motion for summary judgment as to the Plaintiff's 42 U.S.C. § 1983 claims, Dismissing such claims with prejudice.

IT IS SO ORDERED.

Dated at Binghamton, New York

July 24, 1996

/s/ Thomas J. McAvoy

Thomas J. McAvoy

Chief U.S.D.J.